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Decisions, Statutes, & C., Concerning the Law of Estates in Land

John R. Rood

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DECISIONS, STATUTES, &c.

CONCERNING THE LAW OF

ESTATES IN LAND

COMPILED BY
JOHN R. ROOD

SECOND EDITION

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PREFACE.

The mystery of the obsolete and forgotten involves the law of real property more than any other part of the law student's work; and most of the solvents of that mystery lie hidden here and there in the year-books, statutes, and old reports, and locked from the average student in a dead and barbarous language. This mystery has been a great embarrassment to me, especially since my attempts to teach the subject; and most of the modern texts and readings have been found to emphasize the last application of the rules or the effect of late American statutes, rather than to expound the original doctrines, without knowledge of which the statutes cannot be understood. Of all the recent publications, Professor Digby's History of the Law on Real Property has been found most helpful.

The following pages have been printed from the notes made from time to time while preparing to conduct exercises in the first course on real property at the University of Michigan, using Blackstone's Commentaries as the text. The design has been to present the great monuments which mark epochs in the various branches of the subject, with only an occasional late example. The prolixity of the originals has often made imperative the alternative to abridge or omit, and abridgment has been preferred. The present is a temporary edition, made to try out the serviceability of such a book by use in class, and trusting to experience to fill the gaps and prune the exuberance of special topics. In this edition several typographical errors in the first impression have been discovered and corrected. The scope of the work has also been extended by numerous additions throughout, and by inserting the chapters on uses, trusts, and powers, which did not appear in the first edition.

JOHN R. ROOD.

Dated, Ann Arbor, February 25th, 1910.

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DECISIONS, STATUTES, &c., CONCERNING ESTATES IN LAND.

CHAPTER I.

TENURES.

CHARTER OF HENRY I, A. D. 1100. (Part omitted.)

If any baron, earl, or other subject of mine, who holds possession from me, shall die, his heir shall not redeem his land, as was the custom in my brother's time, but shall pay a just relief for the same; and in like manner, too, the dependents of my barons shall pay a like relief for their land to their lords. And if any baron or other subject of mine shall wish to give his daughter, his sister, his niece, or other female relative, in marriage, let him ask my permission on the matter; but I will not take any of his property for granting my permission nor will I forbid his giving her in marriage except he wishes to give her to an enemy of mine. * * *

MAGNA CHARTA OF KING JOHN, signed July 15, A. D. 1215.

c. 2. If any of our earls or barons or any other which hold of us in chief by knight's service, die, and at the time of his death his heir be of full age, and owes us relief, he shall have his inheritance by the old relief; that is to say, the heir or heirs of an earl, for a whole earldom, 100*l.*; the heir or heirs of a baron, for a whole barony, 100 marks; the heir or heirs of a knight for one whole knight's fee, 100*s.* at the most; and he that has less shall give less, according to the old custom of the fees.

c. 3. But if the heirs of any such be within age (his lord shall not have ward of him, nor of his land, before taking homage of him; and after such an heir has been in ward), when he comes to full age (that is 21 years), he shall have his inheritance without relief and without fine; (so that if such an heir, being within age, be made a knight, yet nevertheless his land shall remain in the keeping of his lord unto the term aforesaid).

The part of c. 3 that is in parentheses was added by the charter of Hen. III, issued in 1216.

c. 4. The keeper of the land, of such an heir being within age, shall not take of the lands of the heir but reasonable issues, reasonable customs, and reasonable services, and that without destruction and waste of his men and his goods. And if we commit the custody of any

such land to the sheriff, or to any other which is answerable to us for the issues of the same land, and he make destruction or waste of those things that he hath in custody, we will take of him amends and recompense therefor, and the land shall be committed to two lawful and discreet men of that fee, which shall answer unto us for the issues of the same land, or unto him whom we will assign. And if we give or sell to any man the custody of any such lands, and he therein do make destruction or waste, he shall lose the same custody; and it shall be assigned to two lawful and discreet men of that fee, who also in like manner shall be answerable to us as afore is said.

c. 5. The keeper, so long as he has the custody of the land of such an heir, shall keep up the houses, parks, warrens, ponds, mills, and other things pertaining to the said land, with the issues of the said land; and he shall deliver to the heir, when he comes to his full age, all his land stored with plows and all other things, at the least as he received it. All these things shall be observed in the custodies of archbishoprics, bishoprics, abbeys, priories, churches, and dignities vacant, which appertain to us, except that such custody shall not be sold.

c. 6. Heirs shall be married without disparagement, so also that before marriage the next of kin of the heir himself shall be consulted.

"But these provisions in behalf of the relations were omitted in the charter of Henry III; wherein the clause stands merely thus: '*haeredes maritantur absque disparagatione;* meaning certainly, by *haeredes*, heirs female, as there are no traces before this to be found of the lord's claiming the marriage of heirs male." 2 Bl. Com. *71.

c. 7. A widow, after the death of her husband, incontinent, and without any difficulty, shall have her marriage, and her inheritance, and shall give nothing for her dower, her marriage, or her inheritance, which her husband and she held the day of the death of her husband; and she shall tarry in the chief house of her husband by 40 days after the death of her husband, within which days her dower shall be assigned her (if it were not assigned her before, or that the house be a castle; and if she depart from the castle, then a competent house shall be provided for her, in which she may honestly dwell, until her dower be to her assigned as is aforesaid; and she shall have in the meantime her reasonable estovers of the common); [and for her dower shall be assigned unto her the third part of all the lands of her husband which were his during coverture, except she were endowed of less at the church door].

The part of c. 7 in parentheses was added by the charter of Hen. III issued in 1216; the part in brackets was added by the charter issued in 1217.

c. 8. No widow shall be distrained to give herself in marriage, nevertheless she shall find surety that she shall not marry without our license and assent if she hold of us, nor without the assent of the lord if she hold of another.

c. 9. Neither we nor our bailiffs will seize any land or rent for any debt while the chattels of the debtor are sufficient for the payment of

the debt; nor shall the sureties of the debtor be distrained while the principal debtor is able to pay the debt; and if the principal debtor fail in payment of the debt, not having wherewith to discharge it, the sureties shall answer for the debt, and if they be willing, they shall have the lands and the rents of the debtor until satisfaction be made to them for the debt which they had before paid for him, unless the principal debtor can show himself acquitted thereof against the said sureties.

c. 12. Let no escuages nor aids be levied in our kingdom if not by the common council of our kingdom, except to ransom our body, make our first born son a knight, and to our first born daughter for marriage once, and for these nothing shall be made but a reasonable aid.

"But this provision was omitted in Henry III's charter, and the same oppressions were continued till the 25 Edward I, when the statute called *confirmatio chartarum* was enacted; which in this respect revived King John's charter, by ordaining that none but the ancient aids should be taken." 2 Bl. Com .*64. See also charter of Henry III, c. 44, below.

c. 15. We will not give leave to anyone for the future to take an aid of his own freemen, except for redeeming his own body, and for making his eldest son a knight, and for marrying once his eldest daughter, and not that unless it be a reasonable aid.

c. 16. None shall be distrained to do more service for a knight's fee, nor for any other tenement, than what is due from thence.

c. 17. Common pleas shall not follow our court, but shall be held in any certain place.

c. 32. We will not hold the lands of them that be convict of felony but one year and one day and then those lands shall be delivered to the lord of the fee.

c. 37. If any do hold of us by fee-farm, or by socage, or burgage, and he holds lands of another by knight's service, we will not have the custody of his heir, nor of his land which is held of the fee of another, by reason of that fee-farm, socage, or burgage; neither will we have the custody of such fee-farm, or socage, or burgage, except knight's service be due to us out of the same fee-farm. We will not have the custody of the heir, or of any land, by occasion of any petit sergeanty that any man holds of us by service to pay a knife, an arrow, or the like.

MAGNA CHARTA, HENRY III (1217).

c. 39. No freeman from henceforth shall give or sell any more of his land but so that of the residue of the lands the lord of the fee may have the service due him which belongs to the fee.

"Upon which act I have heard great question made whether the feoffments made against the statute were voidable or no; and some have said that the statute intended not to avoid the feoffments, but implicate to direct the tenure, viz., that the tenant should not enfeoff another of parcel to hold of the chief lord (that is of the next lord) but to hold of himself, and then the lord may distrain in every part for his whole service without any prejudice unto him. But this opinion is against the authority of our books and against said statute of Magna Charta." Coke Lit. *43a.

"As against the lord, freedom of alienation (in favor whereof Bracton argues with unusual earnestness, f. 45b [below], seems very perfect [from the cases in Bracton's Note Book], and we look in vain for cases to show that the restrictive clause in the charter of 1217 had any effect; we may well doubt whether the king's justices thought well of that clause or of some other clauses of the charter." Prof. Maitland's preface to Bracton's Note Book, vol. 1, p. 134.

"And by this statute the king took benefit to have a fine for his license, before which statute no fine for alienation was due to the king; for it is adjudged 20 Ass. p. 17; 26 Ass. p. 37; 20 Edw. 3, Fitz. Abr. Avowry 126) that for an alienation in the time of Hen. II no fine was due; and it appeareth in our books, that if an alienation had been made before 20 Hen. III, no fine was due to the king for alienation. * * * And it is to be observed, that no record can be found, that either a license of alienation was sued, or pardon for alienation was obtained for an alienation without license, at any time before the 20th year of Hen. III; and it is holden in the 20th Edw. III, that a license for alienation grew by this statute (20 Ass. pl. 17, by Skipwith). Now in the case of a common person it was the common opinion that if the tenant had alienated any parcel contrary to the said act, that he himself was bound by his own act, but that his heir might have avoided it; and in the king's case many held the same opinion. * * * But now by the statutes 1 Edw. III, c. 12, and 34 Edw. III, c. 15, although the king's tenant in chief or by grand sergeanty do alien all or any part without license, yet is there not any forfeiture of the same, but a reasonable fine therefor to be paid. And note it appeareth by the preamble in 1 Edw. III, that complaint was made that lands holden of the king in capite, being alienated without license, was seized as forfeited." Coke Lit. 43 a & b. A. D. 1620-30.

c. 43. It shall not be lawful from henceforth to any to give his lands to any religious house, and to take the same land again to hold of the same house. Nor shall it be lawful to any house of religion to take the lands of any, and to lease the same to him of whom they were received to be holden. If any from henceforth so give his lands to any religious house, and thereupon be convict, the gift shall be utterly void, and the land shall accrue to the lord of the fee.

"But as this prohibition extended only to religious *houses* bishops and other sole corporations were not included therein; and the aggregate ecclesiastical bodies (who Sir Edward Coke observes, in this were to be commended, that they ever had of their counsel the best learned men that they could get), found many means to creep out of this statute, by buying the lands that were *bona fide* holden of themselves as lords of the fee, and thereby evading the forfeiture; or by taking long leases for years, which first introduced those extensive terms for a thousand years or more, which are now so frequent in conveyances." 2 Bl. Com. 270.

For further legislation to avoid this defect see the statute *De Viris Religiosis, post.*

c. 44. Scutage from thence shall be taken as it was accustomed to be taken in the time of King Henry our grandfather.

BRACTON'S LAWS AND CUSTOMS OF ENGLAND—A. D. 1256? (1240-1267).

Lib. 1, c. 19, § 2, ff. 46 a & b. Also it is to be seen whether he to whom a thing has been given may further give the thing given to him

without prejudice to the chief lords; and it appears so; because if a donation be further made, although the chief lord suffers damage by it, nevertheless injury is not done to him, because all damage does not inflict injury, but on the contrary injury implies damage. Because the term injury is applied to everything which is done not rightfully, and upon injury there follows an action to remove the injury and that from which the injury results; but where there is damage and no injury an action does not follow to remove the nuisance from which the damage results. But some person may say, that from the fact that the donatory further gives and transfers the thing given to others, that he cannot do this, because the lord through this loses his service, which is not true, with all due respect and reverence for the chief lords. And it is generally true that a donatory may give to whom he pleases realty and land given to himself, unless it be specially provided in the possession that he may not. For when a person has given a tenement he gives a certain tenement in such a manner, that he is to receive certain customs and a certain service, according as has been said above. And hence he cannot claim more of right, if he shall have had what is agreed upon, and so he takes what is his own and goes his way. * * * It appears, therefore, from the premises, that when a donation by a lord to his tenant is perfect and free, absolute and not conditional nor servile, no injury is done to the lord from the fact, that the tenant has further given it, for injury results from the fact if (he has done so) against a mode or a covenant. If my tenant has made a donation it is asked to whom he has done an injury? Not to the lord, for the lord has whatever belongs to himself, and the tenement charged and burdened, whatever may be said to whomsoever it may have come. Likewise neither the feoffee, for it matters not to the chief lord whosoever has his fee, since the tenant is his tenant, although through an intermediate tenant. And if he shall say that he has entered his fee unjustly, I say not so; because the fee is not his in the domain, but is his tenant's, and the lord has nothing in the fee except a service; and so the tenant will have the fee in the domain, and the lord will have the fee in the service. And if the lord shall prohibit his tenant to work his pleasure with the tenement, which he holds in domain, the lord so enters into the tenement of his tenant and causes him a disseisin, unless a mode or covenant added to the donation itself induces otherwise, since anyone may add in a donation a mode or covenant and a law which shall always be observed. But the fee of the lord is said to be this, homage and service and not the tenement in domain, and therefore he who enters upon the homage and his service does him an injury, and not he who enters upon the tenement, which his tenant holds in domain, as above said.

Lib. 2, c. 35, f. 81. In the same way the tie of homage may be dissolved and extinguished as regards the person of the tenant, and attach to the person of another, as for instance, where the tenant, when he has done homage to his lord has altogether relieved himself of his inheritance and has enfeoffed another to hold of the chief lord, and in that case

the tenant is released from the duty to render homage, and the homage is extinguished, whether with or against the will of the chief lord, and the tie attaches to the person of the feoffee, who is bound because of the tenement which he holds, because it is the fee of the chief lord.

THE STATUTE OF MERTON, 20 Hen. III—A. D. 1235.

c. 6. Of heirs that be led away, and withheld or married by their parents or by others, with force against our peace, thus it is provided: That whatsoever layman be convict thereof, that he hath so withheld any child, led away, or married, he shall yield to the loser the value of the marriage; and for the offense, his body shall be taken and imprisoned until he has recompensed the loser, if the child be married; and further until he has satisfied our lord the king for the trespass; and this must be done of an heir being within the age of fourteen years. And touching an heir being fourteen years old or above, unto his full age, if he marry without license of his lord to defraud him of the marriage, and his lord offer him reasonable and convenient marriage, without disparagement, then his lord shall hold his land beyond the term of his age, that is to say, of one and twenty years, so long that he may receive the double value of the marriage, after the estimation of lawful men, or after as it has been offered him for said marriage before without fraud or collusion, and after as it may be proved in the king's court. And as touching lords which marry those that they have in ward to villains, or other as burgesses, where they be disparaged, if any such an heir be within age of fourteen years, and of such age that he cannot consent to the marriage, then if his friends complain of the same lord, the lord shall lose the wardship unto the age of the heir, and all profits that thereof shall be taken shall be converted to the use of the heir being within age, after the disposition and provision of his friends, for the shame done to him; but if he be fourteen years and above, so that he may consent and does consent to such marriage, no pain shall follow.

c. 7. If an heir, of what age soever he be, will not marry at the request of his lord, he shall not be compelled thereunto; but when he comes to full age, he shall give to his lord and pay him as much as any would have given him for the marriage, before the receipt of his land, and that whether he will marry himself or not; for the marriage of him that is within age of mere right pertains to the lord of the fee.

STATUTE OF MARLEBRIDGE, 52 Henry III—A. D. 1267.

c. 16. If any heir after the death of his ancestor be within age, and his lord have the ward of his lands and tenements, if the lord will not render unto the heir his land when he comes to his full age, without plea, the heir shall recover his land by assize of *mort d'ancestor,* with the damages that he has sustained by such withholding, since the time that he was of full age. And if an heir at the time of his ancestor's death be of full age, and he is heir apparent and known for heir, and

be found in the inheritance, the chief lord shall not put him out, nor take nor remove anything there, but shall take only simple siezin therefore for the recognition of his seigniory, that he may be known for lord. And if the chief lord do put such an heir out of the possession maliciously, whereby he is driven to purchase a writ of *mort d'ancestor* or of *cousenage,* then he shall recover his damages as in assize of novel disseizin. Touching heirs which hold of our lord the king in chief, this order shall be observed, that our lord the king shall have the first seizin of their lands, like as he was wont to have before time; neither shall the heir, nor any other intrude into the same inheritance, before he has received it out of the king's hands, as the inheritance was wont to be taken out of his hands and his ancestors' in time past; and this must be understood of lands and fees which were accustomed to be in the king's hands by reason of knight's service, or sergeanty, or right of patronage.

STATUTE OF WESTMINSTER I, 3 Edw. I—A. D. 1275.

c. 22. Of heirs married within age, without the consent of their guardians, afore that they be past the age of fourteen years, it shall be done according as it is contained in the statutes of Merton. And of them that shall be married without the consent of their guardians after they be past the age of 14 years, the guardian shall have the double value of their marriage, after the tenor of the same act. Moreover, such as have withdrawn their marriage, shall pay the full value thereof unto their guardian for the trespass, and nevertheless the king shall have like amends, according to the same act, of him that has so withdrawn. And of heirs females, after they have accomplished the age of 14 years, and the lord to whom the marriage belonged will not marry them, but desirous of the land will keep them unmarried; it is provided that the lord shall not have nor keep, by reason of marriage, the lands of such heirs females, more than two years after the term of the said 14 years. And if the lord within the said two years do not marry them, then shall they have an action to recover their inheritance quit, without giving anything for their wardship or their marriage. And if they of malice, or by evil counsel, will not be married by their chief lords where they shall not be disparaged, then their lords may hold their lands and inheritance until they have accomplished the age of an heir male, that is, to-wit, 21 years, and further until they have taken the value of the marriage.

c. 36. For as much as before this time, reasonable aid to make one's son knight, or marry his daughter, was never made certain, nor how much should be taken, nor at what time, whereby some levied unreasonable aid, and more often than seemed necessary, whereby the people were sore grieved; it is provided that from henceforth of a whole knight's fee there be taken but 20*s.*; and of 20*l.* land held in socage 20*s.*, and of more, more, and of less, less; after the rate. And that none shall levy such aid to make his son knight until his son be 15 years of age, nor to

marry his daughter until she be of the age of seven years; and that there shall be made mention in the king's writ formed on the same, when any will demand it. And if it happen that the father, after he has levied such aid of his tenants, die before he has married his daughter, the executors of the father shall be bound to the daughter for so much as the father received for the aid; and if the father's goods be not sufficient, his heir shall be charged therewith to the daughter.

STATUTE DE VIRIS RELIGIOSIS, 7 Edw. I, A. D. 1279.

The king to his justices of the bench, greeting: Where of late it was provided that religious men should not enter into the fees of any without license and will of the chief lord of whom such fees be held immediately, and notwithstanding such religious men have entered as well into their own fees as into the fees of other men, appropriating and buying them, and sometimes receiving them of the gift of others, whereby the services that are due of such fees and which at the beginning were provided for the defense of the realm, are unlawfully withdrawn, and the chief lords do lose their escheats of the same, We therefore to the profit of our realm, intending to provide convenient remedy by the advice of our prelates, earls, barons, and other our subjects, being of our council, have provided, made, and ordained, that no person, religious or other, whatsoever he be, that will buy or sell any lands or tenements, or under the color of gift or lease, or that will receive by reason of any other title, whatsoever it be, lands or tenements, or by any other craft or device will presume to appropriate to himself under pain or forfeiture of the same, whereby such lands or tenements may any wise come into mortmain. We have provided also that if any person, religious or other, do presume either by craft or device to offend against this statute, it shall be lawful to us and other chief lords of the fee immediate to enter into the land so alienated within a year from the time of the alienation, and hold it in fee as an inheritance. And if the chief lord immediate be negligent, and will not enter into such fee within the year, then it shall be lawful to the next chief lord immediate of the same fee to enter into the same land within half a year next following, and to hold it as aforesaid; and so every lord immediate may enter into such land if the next lord be negligent in entering into the same fee, as is aforesaid. And if all the chief lords of such fees, being of full age, within the four seas, and out of prison, be negligent or slack in this behalf for the space of one whole year, we, immediately after the year accomplished from the time that such purchases, gifts, or appropriations happen to be made, shall take such lands and tenements in our hand, and shall enfeoff other therein by certain services to be done to us for the defense of our realm, saving to the chief lords of the same fees their wards and escheats, and other things to them belonging, and the services for the same due and accustomed. And therefore we command you that you cause the aforesaid statute to be read before you, and from henceforth to be kept firmly and observed. Witness myself at Westminster the 15th day of November, the seventh year of our reign.

"This seemed to be a sufficient security against all alienations in mortmain: but as these statutes extended only to gifts and conveyances between the parties, the religious houses now began to set up a fictitious title to the land which it was intended they should have, and to bring an action to recover it against the tenant; who by fraud and collusion, made no defense, and thereby judgment was given for the religious house, which then *recovered* the land by sentence of law upon a supposed prior title. And thus they had the honor of inventing those fictitious adjudications of right which are since become the great assurance of the kingdom, under the name of common recoveries." 2 Bl. Com. *270-1.

STATUTE QUIA EMPTORES or Statute of Westminster III, 18 Edw. I, Statute 1.—A. D. 1290.

c. 1. For as much as purchasers of lands and tenements of the fees of great men and other lords have many times heretofore entered into their fees, to the prejudice of the lords, to whom the freeholders of such great men have sold their lands and tenements to be holden in fee of their feoffors and not of the chief lords of the fees, whereby the same chief lords have many times lost their escheats, marriages and wardships of lands and tenements belonging to their fees, which thing seems very hard and extreme unto those lords and other great men, and moreover in this case manifest disheritance, our lord the king in his parliament at Westminster after Easter the eighteenth year of his reign, that is to-wit in the quinzine of St. John Baptiste, at the instance of the great men of the realm granted, provided, and ordained, that from henceforth it should be lawful to every freeman to sell at his own pleasure his lands and tenements or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his feoffor held before.

c. 2. And if he sell any part of such lands or tenements to any, the feoffee shall immediately hold it of the chief lord, and shall be forthwith charged with the services for so much as pertaineth or ought to pertain to the said chief lord, for the same parcel, according to the quantity of the land or tenement so sold, and so in this case the same part of the service shall remain to the lord, to be taken by the hands of the feoffee, for the which he ought to be attendant and answerable to the same chief lord, according to the quantity of the land or tenement sold for the parcel of the service so due.

c. 3. And it is to be understood that by the said sales or purchases of lands or tenements or any parcel of them, such lands or tenements shall in no wise come into mortmain, either in part or in whole, neither by policy nor craft, contrary to the form of the statute made thereupon of late. And it is to-wit that this statute extendeth but only to lands held in fee simple, and that it extends to the time coming. And it shall begin to take effect at the feast of St. Andrew the apostle next coming.

NOTE, Yearbooks (Horwood), 21 & 22 Edw. I, p. 640.—A. D. 1294.

Note that a man may enfeoff another to hold to him and the heirs of his body begotten, to be holden of him (the feoffor) by a certain

service by the year; and in this case there is no need that he be enfeoffed to hold of the chief lord of the fee; for the statute *'Quia Emptores Terrarum,"* &c., is understood of the case of one enfeoffing another in fee simple and not in fee tail.

STATUTE OF WESTMINSTER II, 13 Edw. I—A. D. 1285.

c. 32. When religious men and other ecclesiastical persons do implead any, and the party impleaded makes default whereby he ought to lose the lands, forasmuch as the justices have thought hitherto that if the party impleaded make default by collusion, that where the demandant by occasion of the statute could not obtain seizin of the land by title of gift or alienation, he shall now by reason of the default, and so the statute [*De Viris Religiosis,* above] is defrauded; it is ordained by our lord the king, and granted, that in this case, after default is made it shall be inquired by the country whether the demandant had right to the thing demanded or no. And if it be found that the demandant had right in his demand, the judgment shall pass with him and he shall recover seizin; and if he hath no right the land shall accrue to the next lord of the fee, if he demand it within a year from the time of the inquest taken; and if he do not demand it within the year, it shall accrue to the next lord above, if he do demand it within half a year after the same year; and so every lord after the next lord shall have the space of half a year to demand it successively, until it come to the king, to whom at length, through default of other lords, the land shall accrue. And to challenge the jurors of the inquest, every of the chief lords of the fees shall be admitted; and likewise for the king, they that will shall challenge. And after the judgment given the land, shall remain [clear] in the king's hands until it be dereigned by the demandant or some other chief lord; and the sheriff shall be charged to answer therefor at the exchequer.

THOREWAY v. NEEL, in Common Bench, Mich. term, 4 Edw. II, A. D. 1310—4 Selden Society Year Books p. 184.

In a writ of entry Alice prayed her age. *Willoughby:* You ought not to have your age, for G, your father, enfeoffed you with these same tenements, so that he did not die siezed. *Denom.:* We are daughter and heir of this same G, to whom you can give no other heir; and so, though it was a purchase, she is now found inherited by the death of John, her brother. BEREFORD [C. J.] to Willoughby: Can you show other heir than her? (And he could not.) Therefore full age must be awaited.

STATUTE I Edw. III, St. 2—A. D. 1327.

c. 12. Whereas divers people of the realm complain themselves to be grieved, because that lands and tenements which be held of the king in chief, and aliened without license, have been seized heretofore into the king's hands, and held as forfeit; the king shall not hold them as

forfeit in such case, but will and grant from henceforth, of such lands and tenements so alienated, there shall be reasonable fine taken in the chancery, by due process.

"Upon which statute it was settled that one-third of the yearly value should be paid for a license of alienation; but if the tenant presumed to aliene without a license, a full year's value should be paid." 2 Bl. Com. *72.

STATUTE, 12 CHARLES II, c. 24.—A. D. 1660.

An Act for Taking Away the court of Wards and Liveries, and Tenures in Capite, and by Knight Service, and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof.

Whereas it has been found by former experience, that the courts of wards and liveries, and tenures by knight service, either of the king or others, by knight service in capite, or socage in capite of the king, and the consequents upon the same, have been much more burdensome, grievous, and prejudicial to the kingdom, than they have been beneficial to the king; and whereas since the intermission of the said court, which hath been from the four and twentieth day of February which was in the year of our lord one thousand six hundred forty and five, many persons have by will and otherwise made disposal of their lands held by knight service, whereon divers questions might possibly arise, unless some seasonable remedy be taken to prevent the same; Be it therefore enacted by the king our sovereign lord, with the assent of the lords and commons in parliament assembled, and by the authority of the same, and it is hereby enacted, That the court of wards and liveries, and all wardships, liveries, primer-seisins, and ousterlemains, values and forfeitures of marriages, by reason of any tenure of the king's majesty, or of any other by knight service, and all mean rates, and all other gifts, grants, charges incident or arising, for or by reason of wardships, liveries, primer-seisins, or ousterlemains, be taken away and discharged, and are hereby enacted to be taken away and discharged, from the said twenty-fourth day of February one thousand six hundred forty-five; any law, statute, custom or usage to the contrary hereof in any wise notwithstanding. And that all fines for alienations, seizures and pardons for alienations, tenure by homage, and all charges incident or arising, for or by reason of wardships, livery, primer-seisin, or ousterlemain, or tenure by knight service, escuage, and also, *aid pur file marier,* and *pur fair fitz chivaler,* all other charges incident thereto, be likewise taken away and discharged, from the said twenty-fourth day of February one thousand six hundred forty and five; any law, statute, custom or usage to the contrary hereof in any wise notwithstanding. And all tenures by knight service of the king, or of any other person, by knight service in capite, and by socage in capite of the king, and the fruits and consequents thereof, happened or which shall or may hereafter happen or arise thereupon or thereby, be taken away and discharged, any law, statute, custom or usage to the contrary hereof in any wise notwithstanding; and all tenures of any honours, manors, lands, tenements or here-

ditaments, or any estate of inheritance at common law, held either of the king or of any other person or persons, bodies politic or corporate, are hereby enacted to be turned into free and common socage, to all intents and purposes, from the said twenty-fourth day of February one thousand six hundred forty-five and shall be so construed, adjudged and deemed to be from the said twenty-fourth day of February one thousand six hundred forty five, and forever thereafter turned into free and common socage; any law, statute custom or usage to the contrary hereof in any wise notwithstanding. * * *

BRADSHAW v. LAWSON, in King's Bench, Mich., 32 Geo. 3.—Nov. 18, 1791—4 Term. 443.

Action of debt for 2*s.* 6*d.* for not attending plaintiff's court baron for Halton manor in respect of a customary estate. Till the reign of Queen Elizabeth all the lands of the manor were (except the lord's demesne lands) of customary tenure of inheritance, passing by customary deeds and the lord's admission. The tenure remains unaltered of several of these estates. The defendant's estate being then parcel of the manor, an indenture of feoffment with livery indorsed thereon was made Oct. 2, 18 Jac. I, whereby the then lord of the manor enfeoffed it for 80*l.* to C and his heirs in fee farm, reserving the yearly rent of 1*l.* 4*s.* 11*d.*, therein called ancient rent, for all other rents. May 14, 1 Car. I, another deed reciting this deed covenanted that all holders of the estate should grind at the lord's mill and do suit at his court as formerly, and be subject to fines and amercements assessed by homage or jury, and that for each default 2*s.* 6*d.* should be paid. This deed was executed by C's son. Defendant's ancestor became possessed of the estate in 1742, since which time no owner had attended court nor been amerced except once in 1742. Case reserved.

Lord Kenyon, C. J.—Notwithstanding all the industry that has been exerted on this occasion, I cannot entertain a doubt on the principal question, which was settled about five centuries ago by a positive act of parliament, the statute of *quia emptores*. And the objection to the plaintiff's claim, which arises on this statute, decides the merits of the cause, and renders it unnecessary to consider the other points that were made by the plaintiff's counsel, which perhaps upon examination would be found equally destitute of all legal principles. It is stated, as the foundation of the plaintiff's demand, that the relation between these parties is that of lord and tenant; as long as that continued, the services to be rendered by the latter were to be regulated by the custom of the manor; and among others was that of attending the lord's court. Now it is stated in the case that the lord of this manor in the reign of James I, by competent deeds of conveyance conveyed the property, of which the defendant is now seized, to the defendant's ancestor, then a customary tenant of the manor. But it has been said that the old services were reserved by the reservation of the fee-farm rent; but if the relation of lord and tenant absolutely ceased to exist, that rent can no longer be

considered as rent-service, but a rent to be recovered according to the contract between the parties. After the statute of *quia emptores* the lord could not by any deed reserve the old services when he conveyed away the estate in respect of which those services were due; for the tenant must hold of the superior lord. By the conveyance the estate was no longer parcel of the manor, nor held of the manor; neither was the defendant's ancestor any longer a tenant of the manor. Therefore on that point, on which all the plaintiff's claim is founded, I am extremely clear that the defendant was not bound to attend the plaintiff's court baron as a tenant of the manor. * * * I am of opinion that the very foundation of his claim totally fails, and that a judgment of nonsuit should be entered. ASHURST, BULLER, and GROSE, JJ., assenting. ***Judgment of nonsuit.***

MATTHEWS v. WARD'S LESSEE, in Md. Ct. of App., Dec. 1839—10 Gill & J. 443.

Ejectment by plaintiff as lessee of Sarah Ward et al., against Henry Matthews, for a lot of land in the city of Annapolis. From judgment for plaintiff, defendant appeals.

Leonard Scott and wife being seised of the lot in fee on Oct. 18th, 1817, by indenture in consideration of five dollars, gave, granted, bargained, and sold it to Henry Price, "in trust for the use of John Henry Scott and his heirs forever; and in case the said John Henry Scott should die without lawful issue, then to have and hold" it for the use of the heirs of Lucy Ward, daughter of said Leonard Scott. The grantors in the deed died; John Henry Scott died, intestate, unmarried, and without heirs; later Lucy Ward died; and plaintiff's lessors claim as her children and heirs. Defendant claims by virtue of a patent issued to him on an escheat warrant taken out by him, claiming that the land escheated to the state on the death of John Henry Scott without heirs. After the patent to Matthews, but before this suit was commenced, Price and wife made a deed, reciting the facts and purpose of the first deed, and granting, bargaining, selling, conveying, and enfeoffing to plaintiff's lessors.

ARCHER, J.—It is contended by the appellant, that the deed from Scott and wife to Price is a deed of feoffment; and as such, the legal title of the property vested by the statute of uses in John Henry Scott in fee; that the remainder over, as being too remote, was void, and that upon the death of John Henry Scott without heirs, the property of course became liable to escheat.

If by the words of the deed and the intention of the parties we could construe this as a deed of feoffment, there would arise no objection to such a result, from an absence of evidence of livery of seisin. The ancient law on the subject of feoffments, which demanded livery of seisin to give them efficacy, we consider as having been abolished, and that now enrollment takes the place of livery and is equivalent to it. The

act of 1766 provided for the enrollment of deeds of feoffment, as well as other deeds, and the act of 1715 declared that livery should not be necessary where the deed was enrolled. (*449) * * *

If this be a deed of bargain and sale, as we think it is, then the use was executed in the bargainee, and the limitations to use are merely trusts in chancery, and the *cestui que trusts* are seised only of an equitable estate, and the question has been discussed whether such an estate is liable in this state to escheat. The case of *Burgess* v. *Wheat,* 1 Eden 177, 1 Wm. Bl. 123, may be considered as having settled the English rule on this subject, though much dissatisfaction (*450) has at various times been expressed at the decision. That the death of the *cestui que trust,* without heirs, did not operate as a forfeiture to the lord was founded on the feudal idea of tenure, the trustee being *in esse,* and being the legal seisin of the land, was the tenant possessing capacities to perform the feudal services; as against him the king possessed no equity. Judge Tucker, in 3 Leigh 518, in speaking of *Burgess* v. *Wheat,* says, there can be nothing more unreasonable than this decision of *Burgess* v. *Wheat,* if we consider it in any other light than as a mere question of tenure; that the trustee should be permitted upon the death of the beneficial owner without heirs, to hold the estate to his own use, is utterly at variance not only with the principles of equity, which consider him a mere machine, an instrument, a conduit, * * * but it seems to me at variance with the natural justice of the case. It is right and proper, that, when the owner of property dies without giving it away, and without leaving any objects having natural claim to his bounty, such as heirs or next of kin, his prosperity should go to the community of which he is a member. The ground upon which the English rule on this subject can alone be maintained, and upon which it was established, is on the principle of tenure; and it becomes therefore important to inquire, whether the doctrine of that case would be supported in this state upon the same ground.

The lord proprietary, by the express terms of the charter, held his lands in free and common socage, and his grantees, or tenants, anterior to the revolution held by the same tenure. Service of a feudal character, or of the nature of feudal services, were attached to his grants; and the incidents of fealty, rent, escheat, and fines for alienation or some of them, were the necessary incidents thereto. At the revolution, when the people of the state assumed the powers of government, and the right theretofore existing in the proprietary, these services and incidents were in effect abolished; thus the oath of allegiance to the state superseded the incidents of fealty; quit rents were abolished, and grants were made without being subject to fine on the alienation of the grantee; and escheats, though they existed, had essentially changed their nature, no longer being technically founded on the same principles. Instead of going to the lord of the fee, who took the land in lieu of the services, because by the death of the tenant without his heirs there was no one to perform the feudal services; they reverted to the state as property without an owner, upon a principle of justice, that the whole community

should hold the derelict property for the benefit of all. After the revolution, therefore, lands became allodial, subject to no tenure, nor to any of the services incident thereto; and if allodial, the supreme power of the state would succeed to them as the king would succeed to allodial property in England by the common law, upon the death of the owner without next of kin. It was said by Lord Mansfield, in 1 Wm. Bl. 163-4, "In personal estates which are allodial by law, the king is the last heir where no kin, and the king is as well entitled to that as to any other personal estate." * * * In analogy, therefore, to the admitted condition of allodial property, and in conformity to the reason and justice of the thing, when the owner of real estate dies without heir, the state is *ultimus haeres,* and takes the property for the benefit of all. * * * [Here the court discusses the state statutes regulating escheat, and holds them to apply to equitable interests.]

If these views be correct, and we think they are, the land held in trust in this case was liable to escheat. Matthews having taken out an escheat warrant, and procured a patent thereon, the next inquiry is, whether it gave him the legal title; and it is insisted that it did, in virtue of the statute of *1 Rich. 3, c. 1.* This statute was confined by its terms to uses. It may therefore be doubted whether it applies to modern trusts, and it is questionable whether it is in force in this state. Cases coming as it would appear within the terms of the statute, if it applies at all to trusts, have been excluded. Thus it has (*455) been held, that this statute does not apply to the trusts of a term. [*Goodtitle d. Jones* v. *Jones*], 7 Term 47. So it has been held, that a feoffment by a *cestui que trust* of a term, without the consent of the legal termor, does not destroy the term. *Doe ex dem. Maddock* v. *Lynes,* 3 Barn & Cres. 388. The universal practice never to rely on the conveyance of the *cestui que trust* for passing the legal title, but to require the conveyance of the trustee for that purpose, which practice is admitted to exist, in *Cornish on Uses,* 33, is very strong to show that the statute of 1 Rich, 3, c. 1, does not apply to trusts; for if it did apply to trusts, then the *cestui que trust* could convey the legal title, and the concurrence of the trustee would be wholly unnecessary. * * * We are therefore of opinion that the plaintiff is entitled to recover at law, and that the remedy of the defendant is in equity.

Judgment affirmed.

VAN RENSSELAER v. HAYS, in New York Ct. of App., March, 1859.—19 N. Y. 68-99.

Action for rent 16 years arrear under a deed made Feb. 15, 1796 by plaintiff's father and devisor in consideration of 5*s.*, and the yearly rents covenants and conditions contained in the deed, which bargained and sold, released and confirmed, 274 acres to Jacob Dietz (defendant's grantor) his heirs and assigns, "yielding and paying therefor yearly and every year" to the grantor his heirs and assigns the yearly rent of 30

bushels of good wheat, four fat fowls, and a day's service with carriage and horses. The grantee covenanted for himself his heirs and assigns to pay &c. At the close of the trial the court found these facts, and that the proper portion of the rent and interest for the portion of the granted premises held by defendant was $485.07, for which he directed judgment for plaintiff. This judgment was affirmed by the general term and defendant appealed here.

DENIO, J. The defendant's position is, that the covenant for the payment of the rent is, in law, personal between the grantor and grantee, or what is sometimes called in the books a covenant in gross, and, consequently, that after the death of the original parties, no action to recover rent can be maintained in favor of or against any persons except their respective executors or administrators. As the law contemplates that the estates of deceased persons shall be speedily settled, and in the natural course of things the personal representatives of a man disappear with the generation to which they belong, the intention of the parties to the indenture to create a perpetual rent issuing out of the premises will, if that position can be maintained, be entirely disappointed; and the argument is, in effect, that the law does not permit arrangements by which [*71] a rent shall be reserved upon a conveyance in fee, and that where it is attempted the reservation does not affect the title to the land, but the conveyance is absolute and unconditional. The design of the parties to create relations which should survive them, and continue to exist in perpetuity by being annexed to the ownership of the estate of the grantee of the land on the one hand, and of the rent on the other, is manifest from the language of the instrument. They were careful to declare that the obligation to pay the rent should attach to those who should succeed the grantee as his heirs and assigns, and should run in favor of the heirs and assigns of the grantor; and the nature of a perpetually recurring payment requires that there should be an endless succession of parties to receive and to pay it. We have a legislative declaration, in an act of 1805, passed about ten years after this conveyance, that grants in fee reserving rents had then long been in use in this state (*Ch.* 98); and the design of the legislature by that enactment was, not only to render such grants thereafter available according to their intention, but to resolve, in favor of such transactions, the doubts which it is recited had been entertained respecting their validity. Still, if, by a stubborn principle of law, a burden in the form of an annual payment cannot be attached to the ownership of land held in fee simple, or if the right to enforce such payment cannot be made transferable by the party in whom it is vested, effect must be given to the rule, though it may have been unknown to the parties and to the legislature; unless indeed the interposition of the latter by the statute which has been mentioned, can lawfully operate retrospectively upon the conveyance under consideration. It is not denied

but that, by the early common law of England, conveyances in all respects like the present would have created the precise rights and obligations claimed by the plaintiff; but it is insisted that the act respecting tenures, called the statute of *quia emptores,* enacted in the eighteenth year of King Edward I, and which has been adopted in this country, rendered such transactions no longer possible. The principles of that statute have, in my opinion, always been the law of this [*72] country, as well during its colonial condition as after it became an independent State. A little attention to the pre-existing state of the law will show that this must necessarily have been so. In the early vigor of the feudal system, a tenant in fee could not alienate the feud without the consent of his immediate superior; but this extreme rigor was soon afterwards relaxed, and it was also avoided by the practice of subinfeudation, which consisted in the tenant enfeoffing another to hold of himself by fealty and such services as might be reserved by the act of feoffment. Thus a new tenure was created upon every alienation; and thence there arose a series of lords of the same lands, the first, called the chief lords, holding immediately of the sovereign: the next grade holding of them; and so on, each alienation creating another lord and another tenant. This practice was considered detrimental to the great lords, as it deprived them, to a certain extent, of the fruits of the tenure, such as escheats, marriages, wardships, and the like, which, when due from the terre-tenants, accrued to the next immediate superior. This was attempted to be remedied by the 32d chapter of the Great Charter of Henry III (*A. D.* 1225), which declared that no freeman should thenceforth give or sell any more of his land, but so that of the residue of the lands the lord of the fee might have the service due to him which belonged to the fee. 1 *Ruffhead's Statutes at Large,* 8. The next important change was the statute of *quia emptores,* enacted in 1290, which, after reciting that "forasmuch as purchasers of lands and tenements (*quia emptores terrarum et tenementorum*), of the fees of great men and other lords had many times entered into their fees to the prejudice of the lords," to be holden of the feoffors and not of the chief lords, by means of which these chief lords many times lost their escheats, etc., "which thing seemed very hard and extreme unto these lords and other great men," etc., enacted that from henceforth it should be lawful for every freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee should hold the same lands and tenements of the chief lord of the same fee by such services and customs as his feoffer held [*73] before. (*Id.* 122.) The effect of this important enactment was, that thenceforth no new tenure of lands which had already been granted by the sovereign could be created. Every subsequent alienation placed the feoffee in the same feudal relation which his feoffer before occupied; that is, he held of the same superior lord by the same services, and not of his feoffor. The system of tenures then existing was left untouched, but the progress of expansion under the practice of subinfeudation was

arrested. Our ancestors, in emigrating to this country, brought with them such parts of the common law and such of the English statutes as were of a general nature and applicable to their situation 1 Kent, 473, *and cases cited in note a to the 5th ed.; Bogardus* v. *Trinity Church,* 4 *Paige,* 178; and when the first constitution of this state came to be framed, all such parts of the common law of England and of Great Britain and of the acts of the colonial legislature as together formed the law of the colony at the breaking out of the revolution, were declared to be the law of this state, subject, of course, to alteration by the legislature. *Art.* 35. The law as to holding lands and of transmitting the title thereto from one subject to another must have been a matter of the first importance in our colonial state; and there can be no doubt but that the great body of the English law upon that subject, so far as it regarded the transactions of private individuals, immediately became the law of the colony, subject to such changes as were introduced by colonial legislation. The lands were holden under grants from the crown, and as the king was not within the statute *quia emptores,* a certain tenure, which, after the act of 12 *Charles II, ch.* 24 abolishing military tenures, must have been that of free and common socage, was created as between the king and his grantee. I have elsewhere expressed the opinion that the king might, notwithstanding the statute against subinfeudation, grant to his immediate tenant the right to alien his land to be holden of himself, and thus create a manor, where the land was not in tenure prior to the 18*th Edward I. The People* v. *Van Rensselaer,* 5 Seld., 334. But with the exception of the tenure arising upon royal grants, [*74] and such as might be created by the king's immediate grantees under express license from the crown, I am of opinion that the law forbidding the creating of new tenant by means of subinfeudation was always the law of the colony, and that it was the law of this state, as well before as after the passage of our act concerning tenures, in 1787. A contrary theory would lead to the most absurd conclusions. We should have to hold that the feudal system, during the whole colonial period, and for the first ten years of the state government, existed here in a condition of vigor which had been unknown in England for more than three centuries before the first settlements of this country. We should be obliged to resolve questions arising upon early conveyances, under which many titles are still held, by the law which prevailed in England during the first two centuries after the Conquest, before the commencement of the Year Books, and long before Littleton wrote his *Treatise upon Tenures.*

The fact that the statute we are considering was re-enacted in this State in 1787, has no tendency to show that it had not the force of law prior to that time. Indeed, the contrary inference is nearly irresistible, when it is seen how it came to be re-enacted. The compilation of statutes prepared by Jones and Varick, and enacted by the legislature, embracing the statute of tenures and a great number of other

English statutes was made in pursuance of an act passed in 1786. It recited the constitutional provision which I have mentioned, and that such of the said statutes "as had been generally supposed to extend to the late colony and to this state, were contained in a great number of volumes, and were conceived in a style and language improper to appear in the statute books of this state. The persons mentioned were, therefore, authorized to collect and reduce them into proper form, in order that such of them as were approved might be enacted into laws of this state, to the intent that thereafter none of the statutes of England or Great Britain should be in force here. 1 Jones & Var., ch. 35, 281. The statute of tenures was not, therefore, understood as introducing a new law, but was the putting into a more [* 75] suitable form certain enactments which it was conceived had the force of law in the colony, and which the constitution had made a part of the law of the state. My views upon this question correspond with those expressed by Mr. Justice Platt, in 18 Johnson, 186. The English crown lawyers appear never to have doubted but that the statute was the law of the colonies. Sir John Somers, attorney-general, and afterwards lord keeper of the great seal in the reign of William III, and who is pronounced by Macaulay to have been, in some respects, the greatest man of his age, together with the solicitor-general, Trevor, gave a written opinion to the king in council, that all the lands in Virginia were held immediately of the crown, and that the escheats and tenure accrued to him and not to the grantors of the lands. The like opinion was given by Sir Edward Northey, attorney-general to Queen Anne, in 1705, in respect to lands in New Jersey. He said that the grantees of the proprietors to whom the Duke of York had assigned his patent, held of the queen and not of these proprietors; and in another opinion, by the same law officer, respecting quit-rents in the colony of New York, he states that no tenure arose upon grants by the Duke of York before he came to the crown, he being a subject; but that where the grant was by the crown there was a tenure, "the crown not being within the statute of *quia emptores terrarum.*" *Chalmer's Colonial Opinions,* 142, 144, 149.

These opinions assume that the statute prevailed here to the same extent as in England, and subject to the same exception in favor of royal grants, upon which a tenure always arises. Judge Ruggles, in giving the opinion of the court in *DePeyster* v. *Michael,* 2 Seld. 467, was led to doubt whether the statute was ever in force in the colonies, from finding that several patents, issued by the colonial governors, purported to create manors and to authorize the patentees to grant lands to be holden of the patentees. But if the king could, notwithstanding the statute, license his immediate tenants to create seigniories, as was attempted to be shown by one of the opinions in *The People* v. *Van Rensselaer,* and is as I am satisfied is the case, these [*76] instruments are quite consistent with the idea that the statute was in force in the colony of New York. Assuming this to have been so, our own law,

in the particular under consideration, is and has at all times, since the organization of political society here, been the same as the law of England.

We are then to ascertain the effect of a conveyance in fee reserving rent, upon the assumption that the statute of *quia emptores* applies to such transactions. In the first place, no reversion, in the sense of the law of tenures, is created in favor of the grantor; and as the right to distrain is incident to the reversion, and without one it cannot exist of common right, the relation created by this conveyance did not itself authorize a distress. The fiction of fealty did not exist. The rent in terms reserved was not a rent-service. Litt., §§ 214, 215. It was, however, a valid rent-charge. According to the language of Littleton, "if a man, by deed indented at this day, maketh a feoffment in fee, and by the same indenture reserveth to him and to his heirs a certain rent, and that if the rent be behind it shall be lawful for him and his heirs to distrain, etc., such a rent is a rent-charge, because such lands or tenements are charged with such distress by force of the writing only, and not of common right." *Id.*, §§ 217, 218. And the law is the same where the conveyance is by deed of bargain and sale under the statute of uses. Co. Litt., 143, b. Mr. Hargrave, in his note to this part of the Commentaries, expresses the opinion that a proper fee farm rent cannot be reserved upon a conveyance in fee, since the statute of *quia emptores;* but he concedes that where a conveyance in fee contains a power to distrain and to re-enter, the rent would be good as a rent-charge. Note 235 to Co. Litt., 143, b. Blackstone says that upon such a conveyance the land is liable to distress, not of common right, but by virtue of the clause in the deed. 2 Bl. Com., 42. The case of *Pluck* v. *Diggs,* 2 Dow & Clark's Parl. Rep., 180, much relied on by the defendant, concedes that rent reserved upon a conveyance of the grantor's whole estate may be distrained for by virtue of a clause of distress. That case turned wholly upon a question of [*77] pleading. The House of Lords held that the Irish statute, corresponding to the 11 George II, ch. 19, § 22, allowing a general avowry, did not extend to a rent-charge, but was limited to cases of rent-service, and that the defendant ought in that case to have set out his title. It was for this reason that the judgment in his favor was reversed. Lord Wynford said, "it is a dreadful thing to be obliged, for a defect in form, to give a judgment contrary to the real merits of the case."

These authorities establish the position that upon the conveyance under consideration a valid rent was reserved, available to the grantor by means of the clause of distress. This rent, though not strictly an estate in the land, *Payn* v. *Beal,* 4 Denio, 405, is nevertheless a hereditament, and in the absence of a valid alienation by the person in whose favor it is reserved, it descends to his heirs. Its nature, in respect to the law of descents, is explained by Lord Coke, who at the same time points out the distinction between such a rent as we are considering, and a rent-service reserved upon a feoffment which created a tenure.

He says that if a man seized of a manor, as heir on the part of his mother, before the statute of *quia emptores,* had made a feoffment in fee of parcel, to hold of him by rent and service, albeit they [the services] are newly created, yet for that they are parcel of the manor, they shall, with the rest of the manor, descend to the heir on the part of the mother. If a man so seized, that is by inheritance from his mother, maketh [now] a feoffment in fee, reserving a rent to him and his heirs, this rent shall go to the heirs on the part of the father. Co. Litt., 12, b. The reason is given in a case in *Hobart,* thus: "If, upon a feoffment of lands which I have on the part of the mother, or in borough English [where the youngest son is the heir] I reserve a rent to me and to my heirs, it shall go to my heirs at common law, for it is not within the custom, *but it is a new thing divided from the land itself.*" *Counden* v. *Clerke,* 31, b. The distinction is this: A rent-service, such as arose upon an alienation of a fee at common law, was incident to the reversion, and therefore a part of the estate remaining in the feoffor [*78] and upon his death it passed in the same channel of descent as the estate would have done if there had been no alienation. But where there is no reversion, as in the case of a conveyance in fee since the statute, the rent reserved is an inheritable estate newly created, and descends according to the general law of inheritance, to the heirs of the person dying seized, with regard to the heritable quality of the estate, the conveyance of which formed the consideration of the rent. Preston states the principle thus: "A rent incident to the reversion will descend with the reversion as a part thereof; but a rent reserved on a grant in fee, or limited by way of use in a conveyance to uses, will be descendible as a new purchase from the person to whom it is reserved or limited." 3 *Essay on Abstract of Title,* 54. Further on he says that in such cases "the instrument amounts to, 1st. A grant of the land from the owner of the same; and, 2dly. A grant of the rent on the part of the grantee." Id., 55. To the same purpose see 3 *Cruise,* 313 (N. Y. ed. of 1834.) The descendible quality of these rents was early established in this state in the case of *The Executors of Van Rensselaer* v. *The Executors of Platner,* decided in the year 1800. The action was for nine years' rent to May 1, 1783, reserved upon a grant in fee by the plaintiffs' testator to the testator of the defendants, executed in 1774; and it appeared that the testator of the plaintiffs died on the 22d of February, 1783, seven days before the last year's rent sued for became payable. The plaintiffs, however, recovered the rent for the whole period; and the defendants moved in arrest of judgment, on the ground that the recovery embraced one year's rent which did not belong to them as executors; and the judgment was arrested for that reason. Kent, J., said, it was clear that the executor could only go for rent due and payable at the testator's death, "where the rent, as in the present case, goes, on the testator's death, to his heirs." 2 John. Ca., 17. There can be no pretense that the court considered the rent to be a rent-service, on the notion that

the statute of *qui emptores* had not been enacted in this state when the deed was executed; for in the next case in the book, which [*79] was an action for subsequent rent on the same conveyance, and was decided at the same time, it was expressly declared to be "a fee farm rent, or *rent-charge.*" If the annual payments provided for in these conveyances were merely sums in gross secured by personal covenants, the action would have been rightly brought by the executors for the last year's rent, though it fell due after the testator's death. The contract, upon that theory, would have been of the same character as a bond for the payment of moneys by annual installments in perpetuity, in which case, if we can conceive of such a security, the personal representatives of the obligees would have been the proper parties to bring the action, whether the payments sought to be recovered matured before or after the testator's death. It was only upon the assumption that the right to the rent reserved was a heritable estate, which, so far as it had not become payable at his death, descended to the heirs of the grantor, that the judgment can be sustained. The case was argued by eminent counsel—the late Ambrose Spencer, and James Emmot—and appears to have received full consideration; three of the judges delivering opinions. It may therefore be considered an authoritative precedent for the doctrine that rents of the character of these we are considering are heritable estates, descending to the heirs of those in whose favor they are reserved.

But the plaintiff in this case sues as devisee of the grantor, and must establish the position that he is entitled, in that character, to sue upon the covenant. In England, it is perhaps a debatable question at this day, whether the assignee of the grantor can maintain the action. In *Brewster* v. *Kidgill,* 12 Mod., 166, Holt, Ch. J., said he made no doubt but that the assignee of the rent should have covenanted against the grantor, "because," he said, "it is a covenant annexed to the thing granted." It was the case of a rent-charge in fee, granted by the owner of the lands out of which it issued, with a covenant to pay it. In *Milnes* v. *Branch,* 5 Maule & Sel., 411, Lord Ellenborough, Ch. J., stated that he was inclined to think that the language of Lord Holt, in this respect, was [*80] extra-judicial; and putting aside that *dictum,* he said he did not find any authority to warrant the position that such a covenant ran with the rent. There are several other English cases bearing more or less directly upon the question, which it is unnecessary particularly to notice, since they have all been examined by Sir Edward Sugden, in a late edition of his *Treatise on the Law of Vendors and Purchasers.* His conclusion is, that there appears to be no foundation for shaking Lord Holt's opinion. The rent-charge, he says, is an incorporeal hereditament, and issues out of the land, and the land is bound by it. The covenant, therefore, he adds, may well run with the rent in the hands of an assignee; the nature of the subject, which savors of the realty, altogether distinguishes the case from a matter merely personal. Vol. 2, p. 482, W. Brookfield ed. of 1843.

The great learning of the author—afterwards as Lord St. Leonards, Lord Chancellor of England—would incline me to adopt his conclusion, were it not that we have a precedent the other way in this State. In *The Devisees of Van Rensselaer* v. *The Executors of Platner,* 2 John. Ca., 26, to which I have already briefly alluded, the plaintiffs made title to the rent under the will of the grantor of the land, and the defendants were the executors of the grantee, the grantor of the rent-charge. It was held—Lansing, Ch. J., giving the opinion—that the action could not be sustained. The statute 32 *Henry VIII, chapter* 34, which had been re-enacted in this state, it was said did not apply, as it was limited, as appeared by the preamble, to cases of grants for life or years, where there was a reversion; and, moreover, by the common law, such covenants did not pass to the assignee of the covenantee. It was intimated that the difficulty might not have existed if the action had been against the owner of the land charged with the rent, as the assignee of the original grantee, instead of his executors; for, as it was suggested, the common ligament—the estate charged—would have united them in interest as privies. But I do not see that this would have helped the plaintiffs. The defendants, as executors of Platner, the covenantor, were liable to an action upon his express covenant, [*81] at the suit of any one entitled to prosecute upon it, and if the plaintiffs, the devisees, were entitled to avail themselves of the covenant they could do so, as it seems to me, against any party chargeable upon it, whether the covenantor himself, his personal representatives, or those who represented him as privies. The question was not whether the defendants were liable to be sued on the express covenant, for they clearly were, whether it ran with the land or not. But the doubt was whether the plaintiffs so represented the original covenantee as to be able to sue on the contract made to him; and this depended on the question whether the covenant ran with the rent; and it was held that it did not. It was probably in consequence of this decision that the act of 1805 was passed; and assuming that this case was correctly decided, the present question must turn upon the effect of that statute. It seems to have been considered that at common law the assignee of a reversion expectant upon an estate for life or years could not maintain an action upon the covenants of his lessee, though such covenants ran with his estate. It is so expressly recited in the preamble to the statute 32 *Henry VIII,* already mentioned, though it was not universallly true. *Vyvyan* v. *Arthur,* 1 Barn. & Cress., 410; 2 Sugd., 468. During the reign of that sovereign the charters and estates of the monasteries, chantries and other religious houses were, by the coercion of the government, surrendered to the king, or came to his hands by force of the statutes made for the suppression of these establishments; and the lands were, for the most part, granted by him to individual subjects. The estates being out on terms for life or years, there was, upon the assumption of the preamble, no person in existence by whom an action could be maintained on the covenants in the lease.

After the recital of this matter, the statute proceeds to give an action upon the covenants, not only to the patentees of the king of the estates of the religious houses and their heirs and assigns, but to all others being grantees or assignees of "any other person or persons than the king's highness," and their heirs and assigns. A second section gave the like remedies by the grantees and their assigns [*82] against the assignees of the grantors. 2 Stat. at Large, 294. Although the statute was made to meet a special occasion, which mainly interested the purchasers of the confiscated property of the church, the language which extended its operation to other grantees of reversions, introduced a valuable amendment into the law of property. When the commissioners under our act of 1786 came to report as to the English statutes suitable to be re-enacted, the act respecting the grantees of reversions was selected for that purpose, and was re-enacted in 1788, with certain changes of language—dropping out the reference to the religious houses, and substituting the people of this state for the crown of England—but retaining the words which adapted it to the case of the grantees of private persons. 2 Jones & Var., 184. It stood in this form when the conveyance to Dietz was executed in 1796, and had not then, as I conceive, any operation upon covenants in conveyances in fee. The opinion of Sir Edward Sugden, that such covenants as last mentioned ran with the rent, was not based upon the 32 Henry VIII, which was admitted to be inapplicable, but upon what was considered the true theory and legal effect of such covenants.

But while Van Rensselaer, the grantor in the indenture under consideration, remained the owner of the rents reserved, and no assignee of those rents had intervened, the act of 1805 was enacted, by which it was declared that all the provisions of the act concerning grantees of reversions, passed in 1788, and the remedies thereby given, should be construed to extend as well to leases in fee reserving rents as to leases for life or years. (Ch. 98.) In the subsequent revision of the statutes, this amendment has been added as an additional section to the substance of the act of 1788. 1 R. L., 364, § 3; 1 R. S., 748, § 25. As the Revised Statutes of 1830 contained the enactment in force when this grantor died, it will be useful to give the precise language of the 23d section of the title referred to. It is as follows: "The grantees of any demised lands, tenements, *rents* or other hereditaments, or of the reversion thereof, the assignees of the lessor of any demise, and the heirs and [*83] personal representatives of the lessor, grantee or assignee, shall have the same remedies by entry, action, distress or otherwise, for the non-performance of any agreement contained in the lease so assigned, or for the recovery of any rent, or for the doing of any waste or other cause of forfeiture as their grantor or lessor had, or might have had if such reversion had remained in such lessor or grantor." 1 R. S., 747. This provision is, as I have stated, by force of the 25th section, to extend as well to grants or leases in fee reserving rents as to leases for life or for years. Thus it appears that the gran-

tees of demised lands, and the grantees of rents, and the grantees of the reversion of demised lands, are to have the same remedies which the grantors or lessors would have been entitled to if no change in their title had taken place, and that grants in fee with a reservation of rent are to be considered as within the provision. Reading the language in connection, the enactment in terms is, that the grantee of rents reserved upon grants in fee shall have the same remedy which his grantor had. Applying the statute to this case, the provision is that the plaintiff shall be entitled to the same remedy which Stephen Van Rensselaer, the Patroon, would have had if he were alive and were now suing. It is added—"if such reversion had remained in such grantor;" and it is argued that as Mr. Van Rensselaer never had a reversion the provision does not apply. But it applies in express terms to reservations of rents upon conveyances in fee, and in such cases I concede that there can be no reversion; and it applies equally to rents upon leases, for life and for years, where there is a proper reversion. Now, the qualification which alludes to the reversion may well be taken distributively and be confined to the cases within the provision where a reversion existed, *reddendo singula singulis.* It should be applied, in furtherance of the intention, to the subject-matter to which it appears by the context most properly to relate. 2 *Dwar. on Stat.,* 617. But independently of this answer, the legislature had the right to consider the interest of a grantor in fee reserving rent, as a reversion *pro hac vice,* if it thought proper to do so; though by the general [*84] rules of law it would not be called by that name. The intent to embrace within the purview of the enactment a rent reserved upon a grant in fee is plain and certain; and effect must be given to that intent, though some of the language should seem to be incongruous.

Two positions were taken at the bar to avoid the effect of this statute upon the case. In the first place, it was assumed that before the passage of our statute of tenures, a reversion did arise upon a grant of lands in fee, and that the act of 1805 should be understood as limited to conveyances executed prior to 1787, and as having, therefore, no effect upon the present case. It was in part to furnish an answer to that suggestion that I have taken pains to show that there was never a period in this state when conveyances between individuals created a tenure, except in the special cases of a grant from the crown of a power to erect a manor. But without reference to that principle, I am unable to find anything in the statute which countenances the distinction contended for. The act of 1805, which first brought grants in fee reserving rents within the remedies of the 32 Henry VIII, chapter 34, recited, as the motive for the enactment, that such grants had long been in use in this state. The argument supposes that it was intended to give effect to such only as had been executed in colonial times and during the first eleven years of the state government. If such were the intention, it is inconceivable that some idea of the kind was not expressed. The language used certainly conveys the understanding that

such transactions had been in use up to the time when the legislature was speaking. I am of opinion that the legislature considered such conveyances lawful contracts, and intended to render them effectual in the hands of those to whom they should be transferred equally as when they belonged to the original parties to whom the rents were reserved, without regard to the time when the grants were made.

The other answer given to the statute is, that these grants in fee were within the protection of the provision of the Constitution of the United States which forbids the state [*85] governments to pass any law impairing the obligation of contracts. But this statute has no such effect. The parties bound to pay these rents were liable, independently of the statute, to an action at the suit of the grantor of the conveyances and of his heirs in perpetuity. Upon the failure of heirs, the state would take them as an escheat. If it be admitted that they were not assignable before the statute, so as to give the assignee an action in his own name, they were, like other choses in action arising upon contract, assignable in equity; and if the statute had not been passed, the assignee could have prosecuted in the name of the grantor or his heirs for the benefit of the equitable owner. In making them assignable at law and giving the assignee an action in his own name, the legislature acted only upon the remedy, which all the cases agree it was competent for it to do. The same thing in effect was done by the Code of Procedure in abolishing the distinction between legal and equitable remedies, and requiring all actions to be brought in the name of the real party in interest. (§§ 69, 111.)

There are several precedents of actions of covenant to recover rents of the kind in question, by parties claiming by devise or assignment from the party in whose favor the rent was reserved. *Watts* v. *Coffin,* 11 John., 495, A. D. 1814, was an action for rent reserved upon a conveyance of land in fee, brought by the assignee of the grantor by virtue of several mesne conveyances, against the assignee of the grantee, and a verdict, subject to the opinion of the court, was sustained. *Van Rensselaer* v. *Bradley,* 3 Denio, 135, A. D. 1846, was a like action for rent on the covenants in a similar conveyance by the devisee of the grantor, against an assignee of the grantee; and the plaintiff prevailed. *Van Rensselaer* v *Jones,* 5 Denio, 449, A. D. 1848, was another case of precisely the same character, where the plaintiff had judgment.

Ejectment is a remedy given by statute for the recovery of rent. Stat. 4 Geo. II, ch. 28, § 2; 2 Jones & Var., Laws of N. Y., 238, § 23; 1 K. & R. 134, § 23; 1 R. L., 1813, 440, § 23; 2 R. S. 505, § 30. The statutes prescribe that it may be brought in cases between landlord and tenant, where there is [*86] rent in arrear for which no distress can be found, and the landlord has a subsisting right to re-enter. When we consider that, at common law, conditions subsequent could only be reserved for the benefit of the grantor and his heirs, and that a stranger could not take advantage of a breach of them (4 *Kent's Com.*. 127; *Litt.,* § 347 *and Coke's Com. thereon; Nicholl* v. *The N. Y. and Erie*

R. R. Co., 2 Kern. 121), and that the only change which this principle has undergone was that wrought by the act of 1805 and its subsequent reenactment, the cases in which the devisee or grantee of one who has conveyed in fee, reserving rent with a clause of re-entry, has sustained ejectment for non-payment of that rent, are in point to show the construction which has been given to that act upon the point under consideration. Such cases have frequently occurred in this state and many have been reported. In the following cases the action was prosecuted by the devisee or grantee of the original grantor. It could only be sustained by virtue of the statute, and yet no objection to the plaintiff's title was made. In two of the cases the plaintiff prevailed, and in the others he was defeated upon grounds not material here. *Jackson* v. *Collins,* 11 John. 1, A. D. 1814; *Van Rensselaer* v. *Jewett,* 5 Denio. 121; *The same* v. *Hayes, id.,* 477; *The same* v. *Snyder, in the Court of Appeals,* 3 Kern. 299.

We have come to the conclusion that the covenant of Dietz was one upon which the plaintiff, as the devisee of Van Rensselaer, has a right to sue any one upon whom that covenant was binding. We do not determine whether this would or would not have been so at the common law, but we place the decision upon the effect of the act of 1805, which, in our opinion, precisely meets the case. * * *

It is argued by the defendant's counsel that a reversion in the grantor is essential to enable an obligation to pay rent to attach to any one except the party originally bound to pay it, or to enure to the benefit of any one deriving title from the party in whose favor it was reserved; and the want of a reversion in Van Rensselaer is the circumstance which is [*99] supposed to create the difficulty under which the plaintiff labors. But there are several cases in hostility to this doctrine. In *McMurphy* v. *Minot,* 4 N. H. 251, the plaintiff, tenant for life, demised the premises to the owner of the reversion, reserving an annual rent, which the latter covenanted to pay, and afterwards conveyed the premises to another, under whom the defendant entered. The action was covenant for rent in arrear, and it was urged that the lessee, being seised of the whole estate in fee simple, his covenant to pay the rent could not be enforced against his grantee; but it was held that a reversion in the plaintiff was not essential, and the plaintiff had judgment. It is settled, by a series of adjudications in England and in this country, that if one possessed of a term for years demise it, reserving rent, and afterwards assign the rent, the assignee may maintain debt for the rent against lessee. *Allen* v. *Bryan,* 5 Barn & Cress., 512; *Demarest* v. *Willard,* 8 Cow., 206; *Willard* v. *Tillman,* 2 Hill, 274; *Childs* v. *Clark,* 3 Barb. Ch. 52; *Kendall* v. *Carland,* 5 Cush., 74.

The result of the examination which we have given to this case is, that these covenants are available in favor of the plaintiff; and that the defendant, as the owner under Dietz of a portion of the land granted, is liable in this action for a breach of them: and we, therefore, affirm the judgment of the Supreme Court.

JOHNSON, Ch. J., COMSTOCK, GRAY and GROVER, Js., concurred; SELDON and STRONG, Js., delivered opinions in favor of affirming the judgment upon grounds differing, in some respects, from those adopted by the court; ALLEN, J., being interested in the question, took no part in the decision.

Judgment affirmed.

Accord: Wright v. Hardy (1899), 76 Miss. 544, 24 So. 698, sustaining a bill for rent by a grantee of part of the reversion against the lessee's grantee.

MICHIGAN STATUTE, R. S. 1846 c. 66, § 31; C. L. 1857, § 2804; C. L. 1871, § 4301; How Ann. St. 1883; § 5771; C. L. 1897; § 9254.

Every person in possession of land, out of which any rent is due, whether it was originally demised in fee, or for any other estate of freehold, or for any term of years, shall be liable for the amount or proportion of rent due from the land in his possession, although it be only a part of what was originally demised.

CHAPTER II.

ESTATES OF INHERITANCE.

Classified and Defined.

BRACTON'S LAWS AND CUSTOMS OF ENGLAND—A. D. 1256? (1240-1267).

Liber ii, c. 6, fo. 17. [*Classification of Fees.*] There is another division of donations, for instance, one is simple and absolute, another is conditional, another is modified, made to one person or to several successively.

[*Fee Simple.*] It may be termed simple and absolute, when there is no condition or mode attached to it, for it may be said to be given simply whatever is given with nothing added to. As if it should be said, I give to such a person so much land in such a vill for his homage and service, to have and to hold to such a one, and to his heirs, of me and of my heirs, rendering thence annually, himself and his heirs to me and my heirs, so much for such terms, for all service and secular custom and demand (so that the thing may be certain which is given, and the services certain, and the customs which are due to the lord, although the other things are uncertain, which are tacitly remitted), and I and my heirs shall warrant, acquit, and defend forever so-and-so aforesaid and his heirs, against all persons, through the aforesaid service. And so the donatory acquires the thing given by reason of the donation, and his heirs after him by reason of their succession, and the heir acquires nothing from the gift made to his ancestor, because he is not enfeoffed with the donatory. And by the expression, to so-and-so and his heirs (the word *heirs* being taken in a wide sense) all heirs are contained as well near as remote, as well present as future; but nevertheless one of them, or several who are equivalent to one, and the nearer are preferred to the more remote, as will be explained hereafter on the subject of successions.

[*Modified Fees—Heirs and Assigns.*] Likewise, he may increase the donations and make, as it were, heirs, although in truth they are not heirs. As if he should say in the donation, to have and to hold to such an one and his heirs, or to him to whom he shall wish to give or assign the land; and I and my heirs will warrant to the same so-and-so and his heirs, or to him to whom he shall wish to give or assign that land, and to their heirs, against all persons. In which case, if the donatory has

given or assigned that land, if the donatory and his heirs fail, the donor and his heirs will begin to take the place of the donatory and his heirs, and the donatories will take the place of heirs as far as regards the warranty to be made to the assigns and his heirs, through the clause contained in the deed of the first donor; which would not be the case unless mention had been made of assigns in the first donation. But as long as the first donatory or his heirs survive, they are themselves bound to the warranty and not the first donor.

[*Same—Restricted to Special Heirs—Fee Conditional at Common Law.*] Likewise, as heirs may be enlarged in number, as has been aforesaid, so they may be narrowed in number by the mode of the donation, whereby all the heirs are not called generally to the succession. For a mode sets law to the donation, and a mode is to be upheld against the common right and against the [general] law, for a mode and an agreement must prevail against the [general] law. As if it should be said: I give to so-and-so that land, with its appurtenances, in N, to have and to hold to him and to his heirs, whom he shall have procreated from himself or his espoused wife. Or thus: I give to so-and-so and so-and-so his wife (or with so-and-so my daughter &c.) to have and to hold to himself and to his heirs, issuing or procreated or to be procreated, of the flesh of such wife (or daughter); in which case, if (since certain heirs are expressed in the donation) it can be seen that the descent is only made to their common heirs according to the mode appointed in the donation, all other his heirs being excluded altogether from the succession, because the donor so willed. Whence if heirs of this kind are procreated, they only are called to the inheritance; and if a person so enfeoffed has further enfeoffed some person, he holds the enfeoffment; and his [the first feoffee's] heirs are held to the warranty since they can claim nothing except from the succession and the descent of parents; although it appears to some that they were themselves enfeoffed at the same time with their parents, which is not true. But if he shall have no heirs, that land shall revert to the donor, through a tacit condition, even if there be no mention made in the donation that it should return, or if express mention has been made in the donation. And so it will happen, if there have been at some time heirs and they have failed. But in the first case, where there has been no heir, the thing given to the donatory will always be a free tenement and not a fee. Likewise, in the second case, until heirs have begun to exist, it is a free tenement; but when they have begun to exist, the free tenement begins to be a fee; and when they have ceased to exist it ceases to be a fee, and again begins to be a free tenement. And so there will never be an exaction of dower unless there be an absolute donation, since there is no mention of an express reservation.

It is to be noted, that a donor may well impose at the beginning from the commencement of his donation, a law upon the donation, and of his own will may exonerate the thing given for the advantage of the donatory, and contrary to the law of the land; provided this be not done to

the prejudice of others, who are not at all concerned with their contract. As if a person has given land for a less service than that by which he held it from his lord and his feoffor; provided that he can warrant his act as regards his own service, so that no prejudice shall be worked to the chief lord, as respects the service due to him.

Liber iv, c. 28, fo. 207. [*Mere Freehold.*] Now it is to be observed that a freehold tenement is that which a man holds to himself and his heirs in fee and in inheritance, or in fee alone, to him and his heirs. Land is also held as freehold when it is held only for life, or for an indefinite period without any fixed limit of time, as for instance until such a thing happens or does not happen; as if it be said "I give to such a one until I provide for him." But a tenement cannot be called a freehold which one holds for a certain number of years, months, or days, though it be for a term of a hundred years, which exceeds the lives of men. Further, a tenement cannot be called a freehold which a man holds at the will of the lord and by favor, which may be revoked in season or out of season, as when a man holds from year to year or from day to day.

Liber ii, c. 5, fo. 13. And it should be known that a gift is made in many ways, sometimes for instance in fee, sometimes for life, sometimes in fee farm, sometimes for a term of life or years. But if it be made in any manner for life, the donee has at once a freehold, so that if he be ejected he can recover by the assize of novel disseizin; and he to whom the land was thus given can give it to another in fee, or for life if he desires, but the gift is liable to revocation. But if he who has held for life makes a gift of the land which he holds for life to anyone in such words as the following, "I give and grant to such a one whatever right I have in such land," although the donor has a freehold, he does not create a freehold in favor of the donee, because when I say "I give you my right" that means "I give such and such land for the life of me the donor," and there is no question about the life of the donee; and therefore although the donor has a freehold, nevertheless by these words he cannot create a freehold in favor of the donee, because if he had said "I give you such land in demesne or in fee," this would be a wrongful act and not the exercise of a right. His right was to give that which he had, that is to say, to give the land for his life, that is for the life of the donor and not for the life of the donee, for the latter would be wrongful and not right, and under a grant for the donor's life the donee cannot acquire a freehold.

Words Sufficient to Limit a Fee.

GIFT OF LANDS TO A CHURCH BY UUIHTRAED OF KENT—A. D. 700 or 715—from Codex Diplomaticus, 1 p. 54, no. xlvii, and Digby's History of Real Property 56.

In the name of our Lord Jesus Christ. I Uuihtraed, king of the Kents, providing for myself in the future, have determined to give something to him who gave all things to me; and with this design, it has seemed best to me

to bestow upon the church of the Blessed Mary Mother of God which is located in the place called Liminga, the land of four plowmen, which is called Pleghelmestun, with all pertaining to that same land, next to the well known boundaries, etc., * * * also a part of that same land I bestow likewise upon the Blessed Mary, Mother of God, to be held for ever, the name of which is Rumingseta, for the feeding of 300 sheep, at the south indeed of the river which is called Liminaea; but the boundaries of this land we do not fix for this reason because they are determined on all sides by the dwellers. This my gift I wish to be assured forever, so that neither I nor my heirs may presume to diminish it in any respect. But if an attempt shall have been made otherwise by any other person whomsoever let him know that he transgresses under penalty of the anathema. For the confirmation of this, on account of my ignorance of letters, I have made the sign of the holy cross and asked suitable witnesses to sign it, that is Berhtwald the archbishop, venerable man.

+ I Berthwald when asked consented and subscribed.
+ The sign of the hand of Uuithraed the king.
+ The sign of the hand of Aethilburgh the queen.
(Other signatures follow in the same form.)

GIFT BY OSWALD BISHOP OF WORCESTER—A. D. 963—Codex Diplomaticus p. 399, no. dix, Digby's History of Real Property 58.

I Oswald adjudged president by the anointing of Christ in the 963 year of the incarnation of the Lord, with the consent of Edgar king of England, Aelfer earl of the Mercians, and likewise the ecclesiastical family of Wiogorn, have granted a certain bit of land, to-wit, one hide in a place inhabited by farmers which is called also by the name of Heortford, to a certain servant of mine by name Aethelnod in perpetual inheritance, and after the end of his life it must be left free to two heirs only, and when these are dead it must be restored to the church of God in camp Wiogorna. [Then follow the boundaries.] This document was written with these witnesses attesting whose names are signed lower down.

[Then follow the names.]

CHARTER OF CNUT—A. D. 1033—Codex Diplomaticus 6, p. 180, No. 1318; Digby's History of the Law of Real Property 59.

Our Lord and Master, Jesus Christ, reigning forever, since under his sway the fortune of passing time seems greatly disturbed and confused for the future, and since all visible and desirable adornments of this world pass away daily from those who love them, therefore, those who are happy and wise hasten eagerly to purchase with these fleeting riches of time the joys of the heavenly country that are eternal and will remain permanently [and] therefore, I, Cnut king of the Angli, and guide and director of the peoples living about, confirm as an inheritance a certain portion of my estate, vii mansas of land in that region to which the inhabitants have given the name Hortun, to my faithful attendant whom his acquaintances and kinsmen are accustomed to call Bovis, that he may well enjoy and forever possess as long as God through his wonderful mercy shall have desired to grant him life and breath, and then indeed he may leave it to one succeeding himself, to whom so ever he pleases, as heir by right of clergy, or, as we have above said, for an eternal inheritance. Let this our gift therefore remain unalterably free, pleasing with all those things which are properly known to belong to this same place, as well in great as in small things, in plains, pastures, meadows, woods, brooks, and water-courses, that common labor being excepted which is plainly imposed upon all, to-wit, the building of roads, bridges, and castles. But if it shall happen at any time that any man present any more ancient book, contrary to the privileges of this book, let it be counted as naught. But if anyone at the instigation

of the foul demon shall have wished to break this decree of ours let him be separated from the fellowship of the holy church of God, and let him be tortured forever in the flames of Hell, along with Judas the betrayer of Christ, unless beforehand he shall have repented with due expiation because he has offended, contrary to our decree. This present sheet of parchment was in truth written in the year 1033 of the incarnation of our Lord, but in the first year of the indiction. By these boundaries the above mentioned land is enclosed. [The boundaries follow in Anglo-Saxon.]

This document is corroborated by the testimony of those witnesses whose names are seen here in letters.

+ I Cnut, master of the scepter of this island, have confirmed this letter of our decree, attesting it with the mark of the blessed cross.

+ I Aethelnoth, archbishop of Dorover, have attested and subscribed.

+ I Aelfric, the archbishop, have corroborated.

+ I Brihtwold, bishop, have confirmed.

+ I Aelfwine, bishop, [&c.].

CHARTER OF FEOFFMENT OF TIME OF KING HENRY II (A. D. 1154-1189)—Madox Formulare Anglicanum, Digby's History of Real Property 61.

Richard de Luci, to all his men and friends, French and English, for the present and future, of all England, Greeting: Know ye that I have given and granted to Radulphus Briton the land of Chiggeville with all things pertaining to the same, to him and his heirs, to hold of me and my heirs in fee and inheritance through service of one knight. Wherefore I desire and strongly enjoin that this same Radulphus and his heirs hold this land well in peace, quiet, liberty, and honor, in bush and plain, in meadow and pasture, in waters, in ways and foot-paths, and in all other things which pertain to that land. Witnesses [&c.].

CHARTER OF FEOFFMENT of date 6 Edw. II, A. D. 1313.—Appendix to book 2 Blackstone's Commentaries.

Know all present and future, that I, William, son of William de Segenho, have given and granted and by this my present charter have confirmed to John son of the late John de Saleford, for a sum of money which he has paid into my hands, an acre of my arable land lying in the plain of Saleford next to the land of one Richard de la Mere; To have and to hold all of the aforesaid acre of land with all its appurtenances, to the aforesaid John and his heirs and assigns, of the chief lords of the fee, rendering and performing yearly to the same chief lords the services therefrom due and accustomed; and I, the said William, and my heirs and my assigns, will forever warrant all the said acre of land with all its appurtenances, to the said John de Saleford and his heirs and assigns, against all men. In witness whereof I have affixed my seal to this present charter. Before these witnesses: Nigel de Saleford, John de Seybroke, Ralph clerk of Saleford, John the miller of the same ville, and others. Given at Saleford the Friday before the feast of Saint Margaret, in the sixth year of the reign of King Edward, son of King Edward.

Memorandum, that on the day and year within written full and quiet seizin of the within specified acre with appurtenances was given and delivered by the within William de Segneho to the within named John de Saleford, in their proper persons, following the tenor and effect of the within written charter, in the presence of Nigel de Saleford, John de Seybroke, and others.

LITTLETON'S TENURES, § 1. (Littleton died in A. D. 1482.)

Tenant in fee simple is he who has lands or tenements to hold to him and his heirs forever; and it is called in Latin *feodum simplex,* for

feodum is the same that inheritance is, and *simplex* is as much as to say, lawful or pure. And so *feodum simplex* signifies a lawful or pure inheritance. For if a man would purchase lands or tenements in fee simple, it behooves him to have these words in his purchase: *To have and to hold to him and to his heirs;* for these words *his heirs* make the estate of inheritance. For if a man purchase lands by these words: *To have and to hold to him forever,* or by these words: *To have and to hold to him and his assigns forever*—in these two cases he has but an estate for term of life, for that there lack these words *his heirs,* which words only make an estate of inheritance in all feoffments and grants.

ANON., 32 Hen. 8, A. D. 1541—Brooke Abr. t. "Conscience" 25.

If a man purchase land, and the vendor execute the estate to the vendee, habendum to him forever without the word *heirs* where the intent of the bargain is to pass a fee-simple, and the vendor on request refuses to make another assurance, there lies a writ of subpoena on the liberal principles of the English law; and it was conceded by AUDLEY, chancellor, clearly, in the time of Henry 8, that if a man sold his land before the statute of uses this would change a use of the fee-simple; and the same is the law of vendors by indenture under the statute 27 Hen. 8 [c. 10 of uses] without the word *heirs;* which note well.

ANON, in K. B, 4 Edw. 6.— A. D. 1550—Brooke's New Cases pl. 406, Marsh's translation, t. Estates, Brooke's Abr. t. Estates 78.

By opinion of the king's bench, if a man devise his land to W. N. paying 10*l.* to the executors, and dies, the devisee has a fee simple, by reason of the payment, without the words, *heirs* or *in perpetuity,* and this shall be supposed the intention of the devisor. The same is the law if a man sell his land to W. N. for 20*l.,* this shall be intended a sale in fee simple without the words *heirs,* for conscience &c., and it is just and right, which is a ground in every law.

ESTOFT'S CASE, in C. B., Hilary, 10 Eliz., A. D. 1568—1 And. 45, pl. 114.

Between Estoft and others, it was adjudged that if land was given to a man and wife and a third person in fee, and the third person releases to the man all the right he has in the land without these words *to him and his heirs,* the man has a fee-simple without words of enlargement.

BALDWIN v. MARTON, Paschae, 31 Eliz., in Common Pleas.—A. D. 1589—1 And. 223, Abridged.

Trespass for breaking close, on not guilty, and special verdict. Earl W., by indenture made a grant of land to Agnes and Anthony Baldwin

(now plaintiff) "and to the heirs of the said Anthony from the date, &c., to the end of 99 years, and from 99 years to 99 years, till such time as 300 years be spent and expired," reserving rent one penny yearly, covenanted to be paid, and with covenant to renew the lease at the end of the 300 years, and without impeachment of said earl or his heirs. After many arguments and citing many cases similar, it was held to be a lease for years only and not a fee or freehold.

DICKINS v. MARSHALL, in Queen's Bench, Trinity, 36 Eliz.—A. D. 1595.—Cro. Eliz., 330.

Toby devised land and goods, after his debts and legacies paid, to R. and M., his children, equally to be divided between them.

The court resolved that an estate for life only passed; for although the devise of land and goods are coupled together, and it be a devise forever of the goods; yet for the land, there being no words to pass the inheritance, only an estate for life passes. And although it was objected that the devise of the land is after his debts and legacies paid, so this is limited after he has made an end of disposing of anything; and though it was to his children, of which his heir was one, so that he intended to give as much to one as to the other; yet the court held, that only an estate for life passed. POPHAM, C. J., said he doubted if any land did pass, in case he had a term for years in any lands, so that the devise of land shall be supplied.

WHITLOCK v. HARDING, A. D. 1614?—Moor 873.

One devised his lands for 99 years, and after, by these words: "I give Agnes, my daughter, all my lands of inheritance, if the law will permit." It was adjudged that Agnes should have the fee simple of the land before devised for the 99 years, without the words to her heirs, The words refer to the land and not to the estate in strict construction; but from the whole the intent appears to pass the inheritance, for the estate for life after the 99 years would be of small value, and it cannot be so understood.

SCEAL v. OXENBRIDGE, in Common Bench, Trinity 12 Jac. I, A. D. 1615.—Moor 871.

In waste the plaintiff made title by a certain feoffment to another to the use of the plaintiff and his heirs, and omitted that he enfeoffed the other and his heirs; and on view of the precedents the writ was adjudged good.

MICHIGAN LAWS of 1881, No. 187. How Stat. § 5730, Comp. Laws, 1897, § 9016.

It shall not be necessary to use the words "heirs and assigns of the grantee" to create in the grantee an estate of inheritance, and if it be

the intention of the grantor to convey any lesser estate, it shall be so expressed in the deed.

To same effect New York, R. S. 1829. Part II, c. I, Title V, § 1.

Base Fees.

KING ALEXANDER'S CASE, 1272-1307—Hargrave's note 6 to Coke Lit. 27a, 1 Cruise Dig. 24; Hale's MSS.

King Henry III gave the manor of Penreth and Sourby to Alexander King of Scots and his heirs kings of Scotland; and Alexander, having daughters of which one was married to the Earl of Hunt, died not having any heir king of Scotland; and for this reason King Edward I recovered seisin, and the coheirs of Alexander were excluded. Lib. Parl. E I, 134, 308.

FIRST UNIVERSALIST SOCIETY OF NORTH ADAMS v. BORLAND, in Sup. Judicial Ct. of Mass., Jan. 6, 1892—155 Mass. 171, 29 Atl. 524, 15 L. R. A. 231.

Bill in equity to enforce a contract to purchase land of plaintiff. Decree for plaintiff. Defendant appeals.

ALLEN, J. The limitation over, which is contained in the deed of Clark to the plaintiff in 1854, is void for remoteness. *Wells* v. *Heath,* 10 Gray, 17, 25, 26. *Brattle Square Church* v. *Grant,* 3 Gray, 142, 152. The fact that the grantor designated himself as one of the persons amongst many others to take under this limitation, does not have the effect to make the limitation valid. He was to take with the rest, and stand upon the same footing with them.

Where there is an invalid limitation over, the general rule is that the preceding estate is to stand, unaffected by the void limitation. The estate becomes vested in the first taker, according to the terms in which it was granted or devised. *Brattle Square Church* v. *Grant,* 3 Gray, 142, 156, 157. *Sears* v. *Russell,* 8 Gray, 86, 100. *Fosdick* v. *Fosdick,* 6 Allen, 41, 43. *Lovering* v. *Worthington,* 106 Mass. 86, 88. Lewis on Perpetuity, 657. There may be instances in which a void limitation might be referred to for the purpose of giving a construction to the language used in making the prior gift, provided any aid could be gained thereby. In the present case, we do not see that any such aid can be gained. The estate given to the first taker does not depend at all upon the validity or invalidity of the limitation over, and the construction of the language used is not aided by a reference thereto.

The grant to the plaintiff was to have and to hold, etc., "so long as said real estate shall by said society or its assigns be devoted to the uses, interests, and support of those doctrines of the Christian religion," as

specified. "And when said real estate shall by said society or its assigns be diverted from the uses, interests, and support aforesaid to any other interests, uses, or purposes than as aforesaid, then the title of said society or its assigns in the same shall forever cease, and be forever vested in the following named persons," etc. These words do not grant an absolute fee, nor an estate on condition, but an estate which is to continue till the happening of a certain event, and then to cease. That event may happen at any time, or it may never happen. Because the estate may last forever, it is a fee. Because it may end on the happening of the event, it is what is usually called a determinable or qualified fee. The grant was not upon a condition subsequent, and no re-entry would be necessary; but by the terms of the grant the estate was to continue so long as the real estate should be devoted to the specified uses, and when it should no longer be so devoted, then the estate would cease and determine by its own limitation. Numerous illustrations of words proper to create such qualified or determinable fees are to be found in the books, one of which, as old as *Walsingham's Case*, 2 Plowd. 557, is "as long as the church of St. Paul shall stand." *Brattle Square Church* v. *Grant*, 3 Gray, 142, 147; *Easterbrooks* v. *Tillinghast*, 5 Gray, 17; *Ashley* v. *Warner*, 11 Gray, 43; *Attorneys General* v. *Merrimack Manuf. Co.*, 14 Gray, 586, 612; *Fifty Associates* v. *Howland*, 11 Met. 99, 102; *Owen* v. *Field*, 102 Mass. 90, 105; 1 Washb. Real Prop. (3d.) 79; 2 Washb. Real Prop. (3d ed.) 20, 21; 4 Kent Com. 126, 127, 132, note; 2 Crabb, Real Prop. §§ 2135, 2136, 2 Flint. Real Prop. 230, 232; Shep. Touchst. 121, 125.

A question or doubt, however, has arisen, though not urged by counsel in this case, whether after all there is now any such estate as a qualified or determinable fee, or whether this form of estate was done away with by the statute *Quia Emptores*. See Gray, Rule against Perpetuities, §§ 31-40, where the question is discussed and authorities are cited. We have considered this question, and whatever may be the true solution of it in England, where the doctrine of tenure still has some significance, we think the existence of such an estate as a qualified or determinable fee must be recognized in this country, and such is the general consensus of opinion of courts and text writers. *Jamaica Pond Aqueduct* v. *Chandler*, 9 Allen, 159, 168; *Leonard* v. *Burr*, 18 N. Y. 96; *Gillespie* v. *Broas*, 23 Barb. 370; *State* v. *Brown*, 27 N. J. L. (3 Dutch.) 13; *Henderson* v. *Hunter*, 59 Penn. St. 335; *Wiggins Ferry Co.* v. *Ohio & Mississippi Railway*, 94 Ill. 83, 93; 1 Washb. Real Prop. (3d ed.) 76-78; 4 Kent Com. 9, 10, 129; See also, of English works in addition to citations above, Shep. Touchst. 101; 2 Bl. Com. 109, 154, 155; 1 Cruise Dig. tit. 1, §§72-76; 2 Flint. Real Prop. 136-138; 1 Prest. Est. 431, 441; Challis, Real Prop. 197-208.

Since the estate of the plaintiff may determine, and since there is no valid limitation over, it follows that there is a possibility of reverter in the original grantor, Clark. This is similar to, though not quite identical with, the possibility of reverter which remains in the

grantor of land upon a condition subsequent. The exact nature and incidents of this right need not now be discussed, but it represents whatever is not conveyed by the deed, and it is the possibility that the land may revert to the grantor or his heirs when the granted estate determines. Challis, Real Prop. 31, 63-65, 153, 174, 198, 200, 212; 1 Prest. Est. 431, 471; *Newis* v. *Lark,* 2 Plowd. 403, 413; [post—] Shep. Touchst. 120; 2 Washb. Real Prop. (3d ed.) 20, 579; 4 Kent Com. 10; *Smith* v. *Harrington,* 4 Allen, 566, 567; *Attorney General* v. *Merrimack Manuf. Co.,* 14 Gray, 586, 612; *Brattle Square Church* v. *Grant,* 3 Gray, 142, 147-150; *Owen* v. *Field,* 102 Mass. 90, 105, 106; *Gillespie* v. *Broas,* 23 Barb. 370; Gray, Rule against Perpetuities, §§ 33, 34, 39, and cases cited.

Clark's possibility of reverter is not invalid for remoteness. It has been expressly held by this court, that such possibility of reverter upon breach of a condition subsequent is not within the rule against perpetuities. *Tobey* v. *Moore,* 130 Mass. 448; *French* v. *Old South Society,* 106 Mass. 479. If there is any distinction in this respect between such possibility of reverter and that which arises upon the determination of a qualified fee, it would seem to be in favor of the latter. But they should be governed by the same rule. If one is not held void for remoteness, the other should not be. The very many cases cited in Gray, Rule against Perpetuities, §§ 305-312, show conclusively that the general understanding of courts and of the profession in America has been that the rule as to remoteness does not apply; though the learned author thinks this view erroneous in principle.

We have no occasion to consider whether the possibility of reverter would or would not pass to an assignee in bankruptcy or insolvency, because the plaintiff expressly waived any right it might have under the second deed from Clark, and we have not, therefore, felt at liberty to consider the second deed, and have been confined to the construction and effect of the first deed. See *Rice* v. *Boston & Worcester Railroad,* 12 Allen, 141. This being so, the plaintiff's title must be deemed imperfect, and the entry must be.

Bill dismissed.

WEED v. WOODS, in New Hampshire Sup. Ct., Dec. 4, 1902—71 N. H. 581, 53 Atl. 1024.

Trespass *quare clausum* for entry by defendant into the chapel enclosure and removing fences, sheds, &c., claiming under a deed by which plaintiff conveyed to defendant her farm with the reservation stated in the opinion. Case transferred from Superior Court.

BINGHAM, J. A construction of the clause in the deed, "reserving, however, the building situated on the last described premises, known as the chapel, together with the right to the land on which such building stands, said building to remain so long as the association owning the

same may want it" necessitates a determination of the extent of territory in which the plaintiff retained a property interest and the nature of that interest. * * *

It matters not whether this clause is technically a reservation or an exception; such a classification lends no aid to its interpretation. The estate retained by the plaintiff in the lot is a fee, not because as a matter of law it "is an exception and not a reservation," but because the clause, "understood in the ordinary and popular sense of its terms," reserves an estate which may be of perpetual continuance. *Cole* v. *Lake Co.*, 54 N. H. 242, 277, 278; *Smith* v. *Furbish*, 68 N. H. 123, 141-5, 44 Atl. 398, 47 L. R. A. 226; 1 Wash. R. P. (6th ed.), *s.* 162. It is not an estate for the life of the plaintiff, for the particular limitation agreed upon by the parties might happen either before or after her decease, or it might never happen. For the same reasons, it is not an estate for years or for any shorter period. It is an estate in fee, determinable upon the association ceasing to want it for chapel purposes. It is not "an absolute fee, nor an estate on condition, but an estate which is to continue till the happening of a certain event, and then to cease. That event may happen at any time, or it may never happen. Because the estate may last forever, it is a fee. Because it may end on the happening of the event, it is what is usually called a determinable or qualified fee." *First Universalist Society* v. *Boland*, 155 Mass. 171, 174; 15 L. R. A. 231, note; 1 Wash. R. P., *s.* 167. By such a construction, the intention of the parties will be carried out and effect given to this clause of the deed. So long as this estate continues, and the plaintiff and her successors in title retain the possession, they will have all the rights in respect to it which they would have if they were tenants in fee simple. 1 Wash. R. P., *s.* 168.

All concurred.

Judgment for the plaintiff.

Fee Conditional at the Common Law.

NEVIL'S CASE, before all the judges of England, Mich., 2 Jac. I.—A. D. 1605—7 Coke 33.

In this term, this case by the command of the king, was propounded to all the judges. Anno 21 Ric. II, Ralph Nevil, Lord of Raby, was by letters patent under the great seal created Earl of Westmoreland, to him and the heirs males of his body; which Ralph, by Margaret Stafford his first wife, had issue Ralph, Earl of Westmoreland, to whom Charles, late Earl of Westmoreland, was lineal male heir of the body of said Ralph the first donee; and the said Ralph the first donee, by Joan daughter of John of Gaunt, Duke of Lancaster, had issue George, Lord Latimer (for all his elder brothers were dead without issue male) from whom was lineally descended Edward Nevil, who now is the nearest issue male to the said donee; and afterwards Charles, Earl of Westmoreland, was attained by outlawry and by parliament, of high treason, and died

without issue male; and now the said Edward Nevil claimed to be Earl of Westmoreland.

And in this case three questions were moved to all the judges of England: 1. If the said limitation of the said dignity to the said Ralph and the heirs males of his body be within the statute *De donis conditionalibus,* or a fee-simple conditional at the common law. 2. Admitting that it was an estate-tail within the said statute, if by the attainder of treason the estate-tail was forfeited by a condition in law *tacite* annexed to the state of the dignity. 3. If the estate of the dignity was forfeited by the act of 26 Hen. VIII, c. 13, or that the said Edward Nevil as heir male of the body of the first donee ought to be Earl of Westmoreland.

And these three points were argued and debated at Sergeant's Inn in Fleet street by the king's attorney and by the counsel of the said Edward Nevil. And *as to the first* it was objected that the said dignity was not within the said statute *de donis,* &c., for diverse causes: (1) Because it was a great dignity, derived from the king as the fountain of all dignity, and therefore it is not within the said act, which speaks only *of tenement' quae multotens dantur sub conditione, viz: cum aliquis terr' suam dat alicui viro* &c.; so this dignity cannot be included within the words tenements or land. (2) The statute saith *in omnibus praedict' casibus post prolem suscitatam hujusmodi feofaffati habuerunt potestatem alienandi,* &c. But this dignity was adherent in the blood of the donee, and could not be alienated or granted, neither after nor before issue; and therefore such cases of dignities were out of the mischief, the words and the intent of the makers of the act *de donis,* &c. And the opinion in *Manxel's Case* in 2 Plow. Com. 1-15, the grant of a thing which does not concern land or tenements, which is personal, is not within the statute, *de donis,* &c. * * *

As to the second point it was resolved that although this dignity be within the statute *de donis conditionalibus,* yet by the attainder of treason, if the statute 26 Hen. VIII (c. 13) had not been made, this dignity had been forfeited by force of a condition in law *tacite* annexed to the estate of the dignity. * * *

As to the third point it was resolved by all the justices that if it had not been forfeited by the common law, that by the statute of 26 Hen. VIII, c. 13, the said Charles had forfeited the dignity. * * *

At the common law before the statute *de donis conditionalibus,* if land had been given to one and the heirs males of his body, in that case, as well the donor as the donee had a possibility—the donor of a reverter if the donee died without issue male, and the donee to have power to alien if he had issue male. For if the donee had issue a son, now to some intent the condition was performed, for *post prolem suscitatam* he had *potestatem alienandi;* and the reason thereof was because he having a fee-simple and having issue, his issue could not avoid the alienation, because he claimed fee-simple, whereof his father might bar him. And although the donee and his issue also after such alienation died without

issue, yet the donor who had but a possibility or condition in law and no reversion or estate in him, could not recover the land against the alienee; for by the having of issue the condition was performed to this intent, *scil.* to make an alienation. But in the same case at the common law, if the donee had issue a son and died, yet the son had not an absolute fee-simple in him, but only the same power which his father had, *scil.* to alien; and if such issue died without issue, and without any alienation made, the land should revert to the donor, as Brian held, 12 Edw. IV, 3, and 18 Edw. III, 46, by Huse. For a collateral heir who is not heir of the body of the donee is not within the form of the gift, the limitation being to the heirs males of the body of the donee, which limitation of heirs males of the body doth exclude all collateral heirs to inherit. But the policy of the law was to give power after issue to alien for two causes: 1, that the estate of a purchaser should not be avoided by a remote possibility, *scil.* if the donee and his issue also should die without issue; 2, if he having a fee-simple should not have power after issue to alien it would be in a manner a perpetuity and a restraint of alienation forever, which the common law for many causes will not suffer. And in 4 Hen. III, [Fitz. Abr.] Formedon 64, it is adjudged, that where lands are given in frank-marriage, and the donees had issue and died, and afterwards the issue died without issue, that his collateral heir should not inherit, for the donor recovered the lands in a formedon in the reverter;[1] and in the said case if the donee had issue two sons and died, and the elder son had issue a daughter and died without issue male, the younger son should inherit a fee-simple *per formam doni* at the common law. So if lands were given to one and to his heirs females of his body, and he had issue a son and a daughter and died, the daughter should inherit an estate in fee-simple *per formam doni.* And mark well the statute *de donis,* &c., doth not create an estate tail but of such estate as was fee-simple conditional and descendible in such form at the common law, as now by the statute the land shall descend; and the only mischief was that the donee after issue had power to alien in disinherison of his issues, and bar of the reversion. But it doth not appear by the said act that although the donee had issue, yet he had not an absolute fee, so that the collateral heir of the issue should inherit; for the words of the act are *Et praeterea cum deficiente exitu de hujusmodi feoffatis, tenementum sic datum ad donatorem vel ad ejus haeredem reverti debuit per formam in carta de dono expressam, licet exitus, si quis fuerit obisset, per factum et feoffamentum ipsoram, quibus tenementum sic fuit datum sub conditione, exclusi fuerunt hucusque de reversione,* &c.; by which it appears that if the heir in tail dies without issue, and without any

[1] The case here referred to seems to be Case No. 61 of Bracton's Note Book; which was a formedon by the daughter of the donor (deceased) against an intruder after the death without issue of the son of the donees in frank-marriage; and the suit failed because sons of the older deceased brother of the plaintiff had the better right. That the land would revert is merely inferred.

alienation male, that the land shall revert, and by consequence shall not descend to the collateral heir; 30 Edw. I, [Fitz. Abr.] Formedon 65 [*post* —]. If the donee in tail had aliened before the statute and afterwards had issue, and then the issue had died without issue, the land should revert; for he had not power to alien at the time of the alienation, but such alienation should bar the issue as it is adjudged in 19 Edw. II, [Fitz. Abr.] Formedon 61, because he claimed fee-simple. N. B.—These rules yet hold place in case of a grant of an annuity to one and the heirs males of his body, and all other inheritances which are not within the statute *de donis conditionalibus*.

Estates Tail.

STATUTE DE DONIS CONDITIONALIBUS, Westm. 2, c. 1, 13 Edw. I.—A. D. 1285.

First, concerning lands that many times are given upon condition, that is, to wit, where any giveth his land to any man and his wife, and to the heirs begotten of the bodies of the same man and his wife, with such condition expressed that if the same man and his wife die without heir of their bodies between them begotten, the land so given shall revert to the giver or his heir; in case also where one giveth lands in free marriage, which gift hath a condition annexed, though it be not expressed in the deed of gift, which is this, that if the husband and wife die without heir of their bodies begotten, the land so given shall revert to the giver or his heir; in case also where one giveth land to another and the heirs of his body issuing, it seemed very hard and yet seemeth to the givers and their heirs, that their will being expressed in the gift was not heretofore nor yet is observed. In all the cases aforesaid after issue begotten and born between them, to whom the lands were given under such condition, heretofore such feoffees had power to aliene the land so given, and to disinherit their issue of the land, contrary to the minds of the givers, and contrary to the form expressed in the gift. And further, when the issue of such feoffee is failing, the land so given ought to return to the giver or his heir by form of gift expressed in the deed, though the issue, if any were, had died; yet by the deed and feoffment of them, to whom land was so given upon condition, the donors have heretofore been barred of their reversion of the same tenements which was directly repugnant to the form of the gift: wherefore our lord the king, perceiving how necessary and expedient it should be to provide remedy in the aforesaid cases, hath ordained, that the will of the giver according to the form in the deed of gift manifestly expressed shall be from henceforth observed, so that they to whom the land was given under such condition shall have no power to aliene the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver or his

heirs if issue fail, either by reason that there is no issue at all, or if any issue be, it fail by death, the heir of such issue failing. Neither shall the second husband of any such woman from henceforth have anything in the land so given upon condition after the death of his wife, by the law of England, nor the issue of the second husband and wife shall succeed in the inheritance, but immediately after the death of the husband and wife, to whom the land was so given, it shall come to their issue or return unto the giver or his heir as before is said. And forasmuch as in a new case new remedy must be provided, this manner of writ shall be granted to the party that will purchase it. * * * The writ whereby the giver shall recover when issue faileth is common enough in the chancery. And it is to wit that this statute shall hold place touching alienation of land contrary to thé form of gift hereafter to be made, and shall not extend to gifts made before. And if a fine be levied hereafter upon such lands it shall be void in the law, neither shall the heirs or such as the reversion belongeth unto, though they be of full age, within England, and out of prison, need to make their claim.

BRITTON, 1 Liber c. 5, Sec. 2, p. *93.—A. D. 1275—1300.

If any one purchase to himself and his wife and their issue begotten in lawful matrimony; by such a purchase the purchasers have only a freehold for their two lives, and the fee accrues their issue if there be any already born; and if not, then the fee remains in the person of the donor until they have issue.

Some have thought that this was written after the statute de donis was passed but before it was understood.

ANON., in the Common Pleas, 2 Edw. 2, A. D. 1308-9—Selden Soc. Year-books, Vol. 1 (1 & 2 Edw. 2), case No. 19, pp. 70-72, also noted in Fitzherbert's Abr. t. Resceit 147.

This case is a writ of dower. The tenant has made default after default. Now here comes A and says that the tenements were given to his father and the heirs of his body begotten, and that he (A) is the eldest son and heir apparent; and he prays to be received to defend his right.

BEREFORD, C. J.* Heir you cannot be during your father's life, for you cannot know which of you will be the survivor. And I put the case that lands are given to a man in fee-tail, and he to whom the gift is "tailed" engenders a daughter, and is afterwards impleaded, and the

*Whether Bereford was chief justice when this case was decided does not appear from the report, but I take it that he was from the fact that he alone speaks for the court. He became chief justice March 15th, 1309.

daughter comes and prays to be received to defend her right and she is received, and then pending the plea he engenders a son, and then the daughter makes default, and the son comes into court and prays to be received:—How can he be received, and how could the right jump across to the male when she has been received as heir? And it is certain that the daughter cannot be heir so long as there is a male; thence it follows [in the present case] while his ancestor is living he cannot be heir.

Toudeby [sergeant arguing for A]. These tenements were given to [his father] and the *issue* of his body, and he is issue and is the eldest.

Herle [sergeant for the plaintiff.] You will never make out that he is "heir;" and if you leave out this word *heir,* then he will not be within the statute [Westm. II, c. 3], for the statute says the *heirs shall be admitted.*

Toudeby. These tenements are given to [the father] and to the heirs of his body engendered, so that the father is only tenant for his life, and for [a mere] freehold, and the right dwells in the person of the issue.

Passeley [also for the plaintiff]. I will show that that is not so; for the father by himself can vouch to warranty in the right, and the warrantor in the right can join battle and the grand assize, and if he [the father thus] loses, he [the son] never shall have recovery of the same land.

Toudeby. If no issue issues he to whom the reversion belongs shall be received, and (what is more) so shall a remainderman who is a total stranger. Why not then the issue, who is more privy?

BEREFORD, C. J. If the tenements were given to the father and mother and the heirs of their two bodies begotten, and the one of them died and the survivor was impleaded, in that case peradventure the issue should be received, for in that case one can know for certain that an heir there cannot be other than one who is begotten of their two bodies.

Toudeby. There may be just the same uncertainty in the one case that there is in the other, for albeit [in the case that you put] one of the two donees is dead, it may be that he has issue three or four sons, and we cannot say which of them will be the heir.

Passeley. If the father desired to pray aid of the son he should not be received, and no more shall the issue [be received in this case].

Toudeby. We have seen before now that a linen-draper of London purchased tenements to himself and his wife and to the heirs of their two bodies begotten; and [the husband and wife] were impleaded and made default; and, because there was no issue, he to whom the reversion belonged came and prayed to be received; and pending the plea a son was born, who was brought into the bench before you in a cradle and prayed to be received and was received; and yet the father and mother were in full life, as they are to this day. Wherefore we pray to be received.

And he was received, etc.

HELTON v. BRAMPTON, in Common Bench, Mich. term, 18 Edw. III,—A. D. 1344.—Yearbooks (Pike) 18 & 19 Edw. III, p. 194-206; also reported in 18 Lib. Ass. 5, Fitzh. Abr. t. Taile 16.

John, son of William de Holton, brought an assise of novel disseisin against two men and their wives and others in the county of Westmoreland. The men and their wives pleaded in bar on the ground that one John De Helton, grandfather of the wives, had two sons, John[1] the elder, and Thomas,[2] the younger. John, the ancestor, &c., gave the tenements to his younger son, Thomas,[2] in fee simple. After the death of Thomas, who died seised, Thomas[3] entered as son and heir and died without issue of his body, and after his death the wives, with their husbands, entered as sisters and heirs. John, the plaintiff, as cousin, abated, claiming as heir. We ousted him; judgment whether the assize, &c. To this the plaintiff said that the gift was made to Thomas [John] and the heirs male of his body, and inasmuch as Thomas, the son of Thomas [John], died without heir male of his body, he entered, as heir of the donor, upon his reversion. And he prayed the assise for damages. The tenants not denying the gift in tail as above, demanded judgment inasmuch as the plaintiff admitted the issue in tail to have been seised, and so the limitation was brought to an end, and the wish of the donor accomplished, and consequently a fee simple adjudged in the issue by force of this gift confessed by the plaintiff; and (said the tenants) we demand judgment whether there ought to be an assise. And thereupon they were adjourned into the bench by reason of difficulty.

* * * *R. Thorpe.* Anyone who is a female is a stranger to such a form of gift; and this is not like *Multon's Case,* on which judgment was given in parliament, and in which the sisters had the inheritance, because in that case the gift was to him and his heirs male, so that his collateral heirs as well as the lineal heirs had the capacity of inheriting, wherefore on such a gift he had a fee simple. Not so in the case before us, in which the reversion of the fee simple was saved by the gift. HILLARY (J.): Then will you say that in this case in which you are, the daughters, if he had any, would not have the inheritance? *R. Thorpe:* It is certain that they would not. * * * STONORE [C. J.]: It is necessary to look at the statute which states the case of entail, and this particular case is not among any of the cases expressly mentioned by the statute, and therefore it is at common law and consequently a fee simple. *Seton:* Certainly, Sir, we rely greatly on that on our side. *Sadelyngstanes:* We understand that in case of such a gift the issue had at the common law, an inheritance in fee simple, for it is certain that they could have aliened; and although alienation is restrained by stat-

[1] The two sons were, according to the record, William the elder, and John the younger. [2] John, according to the record. [3] John's son Thomas, according to the record.

ute, the estate, when it is continued, remains as it was at common law, that is to say, one of fee simple. *Maubray:* This limitation by which the gift is made to a man and the heirs male of his body is more restricted, and does not give inheritance so largely as if the gift were made to one and the heirs of his body; in which case the twentieth in descent would have only a fee tail, and in default of issue the land would be revertible, &c.; and all the more in this case.

WILLOUGHBY [J.] (to the plaintiff): It will be necessary to take the assise, because another tenant has, in the same assise, pleaded to the assise with respect to a part of the land; therefore as to this sue an assise in respect to the damages, and as to the rest sue an assise also. And so note that female issue will not inherit by such a gift, even though the issue male was seised.

ABRAHAM v. TWIGG, in B. R., Trinity, 38 Eliz.—A. D. 1597.—Cro. Eliz. 478, Moor 424. Abridged from Croke.

Avowry for rent. On demurrer. Peter, seised in fee, made a feoffment to the use of himself and the heirs of his body, and in default of such issue to Gabriel and his *heirs males,* and in default of such issue, to the right heirs of Peter. Peter died without issue; Gabriel entered, devised the rent out of the land to the avowant, and died having issue. It was argued that Gabriel had an estate tail, though it was not limited to the heirs of his body; because it is by way of use, which is to be expounded according to the intent, and as wills, citing 9 Edw. 3, "Tail" 21; 5 Hen. 6, pl. 6.

All the Justices (Popham, C. J., absent) held that it was an estate in fee in Gabriel; and although it were by way of use, it differs not from other gifts by deed, and shall not have any other construction. And it cannot be an estate tail, because there is not any body from whom this heir male should come. And so it is in a case by devise, as appears 9 Hen. 6, pl. 25. Wherefore it was adjudged for avowant.

WILLION v. BERKLEY, in Common Bench, Trinity, 4 Eliz.—A. D. 1562—Plowd. Com. *223-252. Abridged.

[*Ejectione Firmae.* It appears by the record that Henry Willion sues Henry Lord Berkley and Richard Knight, for ejecting him from seven acres of wood in Weston, and declares that Henry Cook, being seised in fee of the land, May 5th, in the 4 & 5 years of Phil. & Mary, demised to the plaintiff for seven years, by virtue of which plaintiff was possessed, and the next day, May 6th, of said year, defendants ejected him. Defendants plead in bar, that long before the time of the supposed ejectment, one Wm. Berkley was seised in fee of the manor of Weston, of which the land in dispute is a part; and being so seised, levied a fine in the king's court 5 Hen. 7, A. D. 1490, by which the land was limited to said Wm. Berkley and the heirs of his body, remainder to King Henry 7,

and the heirs males of his body, remainder to the right heirs of said Wm. that afterwards said William died without issue, after whose death King Henry 7 entered in his said manor in his estate tail male, and died leaving issue his son, King Henry 8, who entered and was seised in the same estate and died leaving issue his son, King Edward 6, who entered and was seised likewise in tail male and died without issue male; and then the late King Henry 7 being dead without issue male, these defendants lawfully entered in their remainder as heirs of said William Berkley, on whom said Henry Cook entered and made the said lease to the plaintiff, on whom defendants rightfully re-entered; and so they demand judgment. Plaintiff rejoined confessing the matter alleged in the plea, and alleging an act of parliament, 35 Hen. 8, and alleging that by birth of issue to King Henry 7 the land became his in fee-simple. Defendants demurred. Many points were argued that are not given in this abridgment, which the curious reader will find reported at large by Mr. Plowden. One point made was that the replication does not state that there was office found on the death of Wm. Berkley, without which King Henry 7 could not lawfully enter.]

ANTHONY BROWN [J.] said, if land is leased to the king for his life, upon condition that if the lessor dies his heirs shall enter, and the lessor dies; there his heir shall not enter without office finding the death, and without *ouster le main* sued. But if it was upon condition that if the king, who is lessee, dies, the lessor shall enter; there if the king dies, the lessor shall enter without office, or *ouster le main* sued. For in the first case the condition is merely a condition, which abbreviates the estate, but in the other case the condition is joined to the limitation of the estate, and the condition and the limitation tend to one end, and the condition does not abridge the limitation as it does in the other case. And therefore when the king dies, the freehold is by act of law cast upon the lessor before entry. So in our case, when King Edward 6 died without heir male, the freehold was cast upon the Lord Berkley, and his entry was lawful without office or *ouster le main;* and the bar reciting that he entered is good enough in this point. Which was agreed by the whole court. Also admitting that an office was necessary here, yet the defendants, by their plea in bar, have amended the fault which they have excepted to. For they themselves, in conveying their title to them have shown that the marquis died without issue, and that King Henry 7 entered. * * *

[Counsel for the plaintiff argued at length that a grant to the king and the heirs male of his body is not a fee-tail, but a fee conditional at common law, and the statute *de donis conditionalibus* does not extend to him; which the defendant's counsel denied. The judges took time to consider, and later in Trinity 4 Eliz. argued upon the matter as follows]:

WESTON, justice. It seems to me that the plaintiff shall recover. * * * By the common law before the statute *de donis conditionalibus,*

there were two estates of inheritance, the one a fee-simple absolute, as where a man had lands to him and his heirs generally, and the other a fee-simple conditional, as where a man had lands given to him and to his heirs of his body, which estate to him and to his heirs of his body was greater than an estate for life, for the word *heirs* makes it greater than for life, so that if he had aliened before issue the donor should not have entered for a forfeiture, as the lessor shall do upon the feoffment of tenant for life. * * * It seems to me that the estate shall be adjudged a fee-simple conditional in the king, and that the remainder shall be void, and that the king shall not be bound by the statute *de donis conditionalibus*. For inasmuch as all justice, tranquility, and repose are derived from the king, as the fountain thereof, the law shows him special favor in all his business [*243] as being the cause and origin thereof. * * * If the king, should be restrained he would be in a worse condition than any other; for every one else may suffer a common recovery, and so make the most of the land and bar their issues, but no recovery can be had against the king, for no *praecipe* lies against him. * * *

ANTHONY BROWN, justice: I am of opinion to the contrary. * * * The person of the king is not to be respected in gifts of land, but the quality of the estate is to be considered; and the person of the king shall not rule the estate in the land. * * * When [*248] the statute ordained that the will of the donor should be observed, from thence it followed consequently that the donee was restrained from alienating lawfully the fee-simple, and from doing other acts which a tenant in fee-simple might do. And when he was thereby restrained from doing lawfully those acts which attended the fee-simple estate, and from meddling with the fee-simple; from thence they took it to be the intent both of the legislature and of the donor, that he should not have a fee-simple; for it would have been an idle intent to have adjudged the fee-simple in him, when he could not lawfully do anything with it. And therefore upon this reason they took it that the fee-simple was left in the donor, and yet that the estate of the donee was an estate of inheritance, because the heirs of his body should inherit it; but this inheritance could not be a fee-simple, for then there would be two fee-simples of the same land; but they took it to be a baser estate of inheritance, and gave it the name of an estate tail, which is an estate of inheritance certainly limited. So that upon good reason, in order to perform the will of the donor and of the legislature also, they took it by the perview that the estate was divided, and that the donee had an estate tail and the donor the fee-simple, which he might grant over to another, or give to another by way of remainder, and that he could not do before the statute; for then the donee had a fee-simple, and one fee-simple cannot depend upon another. For in 3 Edw. 3 a man levied a fine *sur conusance de droit come ceo que il ad de son done,* and he could not make a remainder over upon such fine, because the gift shall be as a fee simple. [See H. 42 Ed. 3, 5b, per Finchd., Brooke Abr. t. Estates 65 *in fine.*] But now that the

estate is divided, the donor may grant the fee-simple over by way of remainder. So that the reason of the purview of the act instructed the expositors of it to divide the estate, and continual use ever since has confirmed the exposition. Wherefore the estate is divided by the intent of the act without precise words, as fully and perfectly as if the act had expressly divided it; for that which is done by the intent of the act, without precise words, is equivalent to that which is done by precise words. So that now the estate is restrained and abridged and altered by the act; and therefore when the king took the estate, he took it restrained and abridged, and he could not take it otherwise. * * * And, sir, if the king would say that the estate was not divided at common law, and that as to him it shall be at this day as it was at the common law, whereby he would have a fee-simple, and [*249] the remainder would be void; by this, I say, he destroys his own estate for the estate-tail precedes his remainder, and if it should be a fee-simple conditional, then the remainder of the king would be void, for a remainder cannot be limited upon a fee-simple precedent. And if the king would say that his remainder is a fee-simple, he cannot say otherwise but that the estate precedent is also a fee-simple; for both estates are made by one same fine at one same time, and both estates are by the donor limited to be in tail. And the king cannot say that the one is in tail and the other in fee, for thereby he affirms and disaffirms at the same time. * * * He is bound by the statute as well as another; and as proof that it has been so taken before, the case of P. 4 Hen. 6 [19 pl. 6; Fitz. Abr. t. Gard 50; Brooke Abr. 52 Tenures 21] has been well cited; where the tenant, who held of the king in capite by knight's service, made a gift in tail, and the donee died, his issue within age, and it was there adjudged that the king should not have the ward, but the donor should have it; for the estate is divided, and the reversion is in the donor, and the donee held of him. * * *

DYER, chief justice: As to the matter in law, I am of the same opinion. * * *

Afterwards on the quinzaine of St. Martin, in the fifth year of the reign of Queen Elizabeth, the justices at the prayer of the Lord Berkley, who had often prayed their judgment after their arguments, gave judgment for him against the plaintiff.

HISTORY OF RESTRAINTS ON ALIENATION BY LIMITING THE FEE.

Heir's Right to Fee Simple Against Alienation by Ancestor.

LAWS OF ALFRED THE GREAT, c. 37.—A. D. 871—901.

Si quis terram haereditariam habeat, eam non vedat a cognitis haeredibus suis, si illi viro prohibitum sit qui eam ab initio acquisivit, ut eta facere nequeat. If any have hereditary land he may not sell it from his kindred heirs if he who acquired it in the beginning provided that it should be impossible to do so.

Laws of Alfred the Great (cir. A. D. 890) *c. 41.* The man who has bocland, and which his kindred left him, then ordain we that he must not give it from his maeg-burg, if there be writing or witness that it was forbidden by those men who at first acquired it, and by those who gave it to him, that he should do so; and then let that be declared in the presence of the king and of the bishop before his kinsmen.

"We may argue, if we will, that this is an attempt to impose upon the alienable book-land some of those fetters which have all along compressed the less alienable folk-land or 'family-land': the *forma donationis* is to be observed, and restrictive forms are not unknown. Nevertheless, here, about the year 900, we see the current of legislation moving, at least for the moment, in favor of the expectant heirs. Either a new law is made for their benefit, or a new sanctity and precision is given to an old law." 2 Pollock & Maitland 251.

"We must admit that most of our evidence relates to book-land, and we have often argued that in all likelihood book-land is an exotic and superficial institution, floating, as it were, on the surface of English law. Of what went on below the surface among those men who had no books we can learn very little. But what we see happening among the great folk is not unimportant, and it is this: the Anglo-Saxon theng who holds book-land does not profess to have his heirs consent when he gives part of that land to a church; his successor, the Norman baron, will rarely execute a charter of feoffment which does not express the consent of one heir or many heirs. Our record is miserably imperfect; but as it stands, it tends to prove that among the rich and noble there was a period when the rights of the expectant heir were not waxing but waning. In the end, as we shall see hereafter, the heir succeeds in expelling the testamentary or quasi testamentary gift of lands from the common law. We have not been arguing for any conclusion save this, that in the present state of our knowledge we should be rash were we to accept 'family ownership,' or in other words, a strong form of 'birthright,' as an institution which once prevailed among the English in England." 2 Pollock & Maitland 252.

"The suggestion therefore may be admissible that at least in some cases 'family ownership,' or the semblance of it, may really be, not the origin, but the outcome of intestate succession. We have but to ask for a time when testamentary dispositions are unknown and land is rarely sold or given away. In such a time a law of intestate succession will take deep root in men's thoughts and habits. The son will know that if he lives long enough he will succeed his father; the father will know that in the ordinary course of events his land will pass from him to his sons. What else should happen to it? He does not want to sell it, for there is no one to buy it; and whither could he go and what could he do if he sold his land? Perhaps the very idea of a sale of land has not yet been conceived. In course of time, as wealth is amassed, there are purchasers for land; also there are bishops and priests desirous of acquiring land by gift and willing to offer spiritual benefits in return. Then the struggle begins, and law must decide whether the claims of the expectant heirs can be defeated. In the past those claims have been protected not so much by law as by economic conditions. There is no need of a law to prohibit men from doing what they do not want to do; and they have not wanted to sell or give away their lands. But now there must be law. The form that the law will take will be determined by the relative strength of various conflicting forces." 2 Pollock & Maitland 247.

LAWS OF HENRY I, c. 70.—A. D. 1100.

Si bockland habeat, quam ei parentes dederint, non mittat eam extra cognationem suam. If one has bookland which the parents gave to him he shall not alienate it from his kindred.

GLANVIL (Tractatus de Legibus et Consuetudinibus*) Liber 7, c. 1.—A. D. 1180?

[*By Livery*]. Every free-man possessed of land may give a certain part of it with his daughter, or with any other woman in marriage-hood, whether he has any heir or not; or whether his heir, supposing he has one, consent to such a disposition or not; nay, though the heir expressly dissent from, and forbid it. Every one may also give a certain part of his freehold estate to any person he chooses, in remuneration for his services, or to a religious establishment in free-alms; that, if seisin follow up the donation, the land shall perpetually remain to the person to whom it is given and his heirs, if the terms of the gift go to that extent. But, if such a donation should not be followed up by seisin, nothing can, after the death of the donor, be claimed with effect in virtue of it contrary to the will of the heir; because such a disposition is usually interpreted by the law of the realm, rather as a naked promise, than a real promise or donation.

[*By Will.*] It is thus, generally speaking, lawful for a man, in his lifetime, freely to dispose of the reasonable part of his land in such manner as he may feel inclined, yet the same permission is not allowed to anyone on his death-bed; because the distribution of the inheritance would, probably, be then highly imprudent, were such an indulgence conceded to men, who, in the glow of sudden impulse, not unfrequently lose both their memory and reason. Hence, it is to be presumed, that if a man laboring under a mortal disease, should then for the first time set about making a disposition of his land, a thing never thought of by him in the hour of health, that the act is rather the result of the mind's insanity than of its deliberation. But yet a gift of this description, if made to any one by the last will, shall be valid, if done with the consent of the heir, and confirmed by his acquiescence in it.

[*Distinction of Purchased from Inherited Land.*] If he possesses inheritable land only he may, as we have already observed, give a certain portion of it to any stranger at his pleasure. But if he has many sons born in wedlock, he cannot, correctly speaking, without the consent of his heir, give any part of his inheritance to a younger son, because if this were permitted, it would then frequently happen that the eldest son would be disinherited, owing to the greater affection which parents often feel toward their younger children. But it may be asked whether a man having a son and heir, can give any part of his inheritance to his illegitimate son? If he can, it follows, that the condition of the illegitimate son would, in this respect, be preferable to that of the younger son

*Written about A. D. 1180, when the author was Chief Justicar of England. This is one of the first treatises on English Common Law.

born in wedlock; and yet the law is so. But if a person desirous of making a donation of part of his lands possess only such as he has purchased, he may then make such gift; provided it does not extend to the whole of his purchased lands, because he cannot disinherit his son and heir. Yet, if he has not any heir, male or female, of his own body, he may, indeed, consult his own inclination in making an absolute gift, either of part or of the whole of his purchased lands. And if the person to whom the gift be made obtain seisin of it during the life of the donor, it is not in the power of any more remote heir to invalidate such gift. Thus a man may give in his lifetime the whole of his purchased land. But he cannot make anyone an heir of it, neither a college, nor any particular individual, it being an established rule of law, that God alone, and not man, can make an heir. If, however, a man possess both inheritable and purchased lands, it is then unquestionably true, that he may absolutely give any part or the whole of the latter to such persons as he pleases; and of his inheritance, he may notwithstanding dispose, according to what we have already observed, provided such disposition be a reasonable one. It should be observed, that if a man having lands in free socage, has many sons, who are all in equal proportions to be admitted to the inheritance, then it is unquestionably true, that their father cannot give a greater part of his inheritable land, or of his purchased if he possess no inheritable, to any one of the sons, than the reasonable part which would fall to such son of the whole inheritance. But the father can in his lifetime give to either of his sons such part only of his inheritable free socage land as such son would be entitled to upon the death of his father by the rule of succession.

"In the thirteenth century the tenant in fee simple has a perfect right to disappoint his expectant heirs by conveying away the whole of his land by act *inter vivos*. Our law is grasping the maxim *Nemo est heres viventis*. Glanvill wrote just in time, though only just in time, to describe the older state of things." 2 Pollock & Maitland 306.

"Glanvill, however, is far from defining an exact rule for every possible case; he nowhere tells us in terms of arithmetic what is that reasonable portion which the father may freely give away. We can see, however, that one main restraint has been the deeply rooted sentiment that a father ought not to give one of his sons a preference over the others; they are equals and should be treated as equals. In the case of partable socage land this sentiment governs; but the introduction of primogeniture has raised a new problem. When Glanvill is writing the court is endeavoring to put the eldest son in the advantageous position that is occupied by each of the sokeman's expectant heirs; without his consent he should not be deprived by any gift made to his brothers of that which was to come to him upon his father's death. But under the new law what was to have come to him at his father's death was the whole of his father's land. Are we then to secure all this for him, and that too in the name of a rule which has heretofore made for equality among sons? If so, then we come to the paradox, that it is better to be a bastard than a legitimate younger son. This could not long be tolerated. Free alienation without the heir's consent will come in the wake of primogeniture. These two characteristics, which distinguish our English law from her nearest of kin, the French customs, are closely connected. The charters of the twelfth century afford numerous examples of expectant heirs joining in the gifts of their ancestors.

Occasionally the giver may explain that he has not obtained his heir's concurrence, because he is disposing not of heritage but of conquest. * * * Well worthy of notice are the cases, not very uncommon, in which little children are made to approve their father's pious gifts; worthy of notice, because an attempt seems made to bind them by receipt of a *quid pro quo*. At Abingdon the monks, fearing that the heir might afterwards dispute the donation, gave him twelve pence and a handsome leather belt. At Ramsey two *infantes* receive five shillings apiece, an *infantulus* a shilling, and a baby held in its mother's arms twenty pence. * * * In some of the charters the heirs are put before us not merely as assenting to, but as joining in the gift; it is a gift by a man and his heirs; in other cases the heirs are named among the witnesses of the deed. What ceremony was observed on these occasions we cannot tell." 2 Pollock & Maitland 307, 308, 309.

Alienation Accomplished by Means of Warranty.

POLLOCK & MAITLAND'S HISTORY OF ENGLISH LAW, vol. 2, pp. 310-311.

The object of the restraint [on alienation] in time past [before Hen. II] has not been solely, perhaps not mainly, the retention of land "in the family"; it has secured an equal division of land among sons, or as equal a division as the impartibility of the knight's fee would permit. It became useless, inappropriate, unbearable, when the eldest son was to have the whole inheritance. No great harm would be done to the feudal lords, at all events to the king, by abolishing it. They had, or they meant to have, some control over the alienations made by their tenants, more control than they could have had under a law which partitioned the inheritance. The material cause of the great change we may find in such considerations as these; but it must have been effected by some machinery of legal reasoning, and we may suspect that the engine which did the work was one that was often to show its potency in after centuries—"the rebutting effect of a warranty." Alan alienates land to William; Alan declares that he and his heirs will warrant that land to William and his heirs. Alan being dead, Baldwin, who is his son and heir, brings suit against William, urging that Alan was not the owner of the land, but that it really belonged to Alan's wife and Baldwin's mother, or urging that Alan was a mere tenant for life, and that Baldwin was the remainderman. William meets the claim thus: "See here the charter of Alan your father, whose heir you are. He undertook that he and his heirs would warrant this land to me and mine. If a stranger impleaded me you would be the very person whom I would vouch to warrant me. With what face then can you claim the land?" Baldwin is rebutted from the claim by his ancestor's warranty. It is a curious and troublesome doctrine, which hereafter will give rise to many a nice distinction. A man is debarred, rebutted, from claiming land because the burden of a warranty given by one of his ancestors has fallen upon him. In later days, already when Bracton was writing, this doctrine no longer came into play when a tenant in fee simple had alienated his land; for in such a case the heir had no right to the land, no claim which must be rebutted. It only came into play when the

alienator and warrantor had been doing something that he had no business to do, when a husband had been alienating his wife's land, or a tenant for life had made a feoffment in fee. But we may suspect that this doctrine performed its first exploit when it enabled the tenant in fee simple to disappoint his expectant heirs by giving a warranty which would rebut and cancel their claims upon the alienated land.

SOMERY v. BURMINGEHAM, In Common Bench, Mich. term 4 Edw. II—A. D. 1310—4 Selden Society Year Books 198.

One John brought his writ of debt against C and demanded 20*l.* "which he owed him." The writ ran: "Command C that justly, etc., he render to J 20*l.* which he owes.' *Hedon* asked what he had for the debt. They produced a deed which said that H, father of C, granted for himself and his heirs to be bound to John in 20*l.* *Hedon:* We pray judgment of the variance between writ and specialty, for the writ supposes that we ourselves are party to the contract; [and] the specialty says that our father, whose heir we are, was party to the contract, whereas he might have had a good writ saying "Command C, son and heir," etc. *Denon:* Is this your ancestor's deed? *Hedon:* We have no need to confess or deny, for we are abating this writ. STANTON [J.]: What you say would be right in a plea of land or a writ of warranty of a charter. But in this personal action the writ and specialty are sufficiently accordant. (And afterwards he answered over.)

Establishment of Doctrine That Heir Takes by Descent.

WILLIAM DeARUNDEL'S CASE, Pleas at Westminster, Hilary Term, 9 Hen. III.—A. D. 1225—Bracton's Note Book, Case 1054.

Radulfus, son of Roger, demanded of William de Arundel five and a half acres of land with appurtenances at Trelley, three acres with appurtenances in Treberned, two acres with appurtenances in Tredeiset, and one acre with appurtenances in Hendr, as his right, of which Roger, his father, was seised as of right in fee and demesne in the time of Henry, king, &c., and which right of Roger to this land descended to said Radulfus as his son and heir. And William came and defended his right; and said that this Roger, plaintiff's father, rendered all this land with appurtenances as his sole and peaceable inheritance to William, the defendant's father, and in the court of our lord the king quit-claimed for himself and his heirs in perpetuity to said William and his heirs; and he produced the charter of Roger which witnessed it. And Radulfus came and acknowledged his father's charter and said quit-claim; but he demanded judgment whether his father could give all the land which he held by knight service reserving no service to himself or his heirs. And because Radulfus acknowledged his father's charter and the charter proved that Roger, his father, rendered this land and quit-claimed it for himself and his heirs it is held that William go hereof discharged and that Radulfus be in mercy.

"Several points may be made clear by this book, but the exact extent of the tenant's power of alienation does not come out very plainly. It should be remembered the whole learning and even the very conception of 'estates' belongs to a later time; Bracton had not the word 'estate,' nor any equivalent for it. Also it should be remembered that but a short time back the man who held land to him and his heirs could by no means always disappoint his heir apparent." Maitland's Introduction to Bracton's Note Book, pp. 133-4.

Note that in writing his treatise later—1250-67?—Bracton lays down the law in accord with this case as unquestioned. See *ante*.

"Unfortunately when in 1194 the rolls of the king's court begin their tale, it is too late for them to tell us much about this matter. However, in 1200 Elyas Croc gave the king 30 marks and a palfrey to have a judgment of the court as to whether a gift made by his father Matthew was valid. Matthew had given to his own younger brother, the uncle of Elyas, a knight's fee which, so Elyas asserted, was the head of the honor and barony. Whether Elyas got a judgment or no we cannot say; but the case looks like an extreme case; the father had been giving away the ancestral mansion. So late as 1225 a son vainly tries to get back a tenement which his father has alienated, and plaintively asks whether his father could give away all the land that he held in military tenure without retaining any service for himself and his heirs; but it is unavailing. Bracton knows nothing of—or rather, having Glanvill's book before him, deliberately ignores—the old restraint; it is too obsolete to be worth a word. The phrase 'and his heirs' in a charter of feoffment gives nothing to an heir apparent." 2 Pollock & Maitland 309.

BRITTON, Liber II, c. 5, Sec. 1, p. *93.—A. D. 1275—1300.

Notwithstanding heirs are named in a purchase, yet no purchase thereby accrues to the heirs. And it must be understood that where any one purchases to himself and his heirs, he purchases to himself and his heirs near and remote, and to have and to hold from heir to heir, as well to those begotten as to those which are to be begotten.

Alienation Restrained by Creating a Fee Conditional At Common Law.

ANON, Cornish Iter, 30 Edw. I.—A. D. 1302:—FitzHerbert Abr. Formedon 65, 1 Gray's Cases on Property p. 412.

Formedon in reverter because the donee died without issue. *Asseby:* The donee alienated before the statute (13 Edw. I. c. 1) and had issue. *Heyham:* He had no issue when he made the alienation. *Asseby:* It may be that he had no issue when he alienated but that he had issue afterwards, and then is the alienation good. *Heyham:* No. *Asseby:* He had had issue. PER CURIAM: It is nothing to the point that he had had issue alive when he alienated; for there might have been issue and the issue might have died; by that alienation the plaintiff will not be barred. *Asseby:* He had issue alive when he made alienation. And the others said the contrary.

The following cases at the same term, if not different reports of the same case, seem to be to the same effect: Kilcart v. Hevys, 30 & 31 Ed. I. p. 196; Waryn de Traneryon v. Thomas de Traneryon, 30 & 31 Edw. I. p. 128; Anon., Id. 384.

BRIAN'S CASE, Trinity term, 32 Edw. I.—A. D. 1304.—Year-books (Horwood) 32 & 33 Edw. I, p. 278. Abridged.

Formedon because the donee had died without issue. *Touthby* [for the defendant]: Robert [the donee, to him and the heirs of his body] had issue, and alienated before the statute [of Westm. 2, c. 1], ready, &c. *Friskney* (for the demandant): The statute states "that such feoffees had power to alienate after issue begotten," and we will aver that Robert had not any issue at the time of or before the alienation, ready, &c. * * * *Malberthorp* [also for defendant]: Our case is at the common law; so it seems that it is sufficient for us to say that he had issue and alienated, &c. HENGHAM [J.]: They say that at the time when Robert alienated he had no issue; and this they offer to aver; Do you accept the averment or not? * * * [Holding the previous answer insufficient.]

Land was given to a man and woman and the heirs of their bodies and thereafter they had issue and later the wife died, the statute *de donis* was passed, he married again and died, and the second wife was endowed of this land. Year-books (Pike) 33 & 35 Edw. III, p. 286.

Alienation Restrained by Creating Estate Tail.

NOTE in Yearbook of 20 & 21 Edw. 1, p. 302.—A. D. 1292.

One Adam purchased a tenement, to hold to him and the heirs of his body begotten, and afterwards took a wife with a good estate, and begot a son. Adam aliened the land so purchased, in despite of the form, &c.; and afterwards he and his wife died; then came the son and brought a writ of formedon against the tenant, and the tenant vouched him to warranty by virtue of his father's deed, and the son said that it was not due course of law to vouch the demandant. And so in this case the voucher was of no avail. But can the objection in this case avail against the father's deed? I say no, because the alienation was made against the form of the gift, unless he has something by descent *ex parti patris.*

TALTARUM'S CASE, Mich. Term, 12 Edw. IV.—A. D. 1473—Year-Books 12 Edw. IV, 19.

In a writ of entry on the statute of 5 Rich. II, (c. 8) *'Ubi ingressus non datur per legem,'* &c., sued against one J. Smith, the defendant said that the plaintiff ought not to have his action, for before the alleged entry one T. B. was seised of the tenements in fee, and gave them to one W. Smith to have and to hold to him and to the heirs of his body begotten, by force of which he was seised, &c., and had issue one Richard and died so seised, and the tenements descended to Richard, and he entered and was seised, and had issue the said J. Smith, and died seised, and the tenements descended to the said J.; and the plaintiff claiming by color of a deed of feoffment, before the gift, &c., entered, on whose possession the said J., as son and heir of the said R. at the time of the alleged entry, entered, &c., on which entry the plaintiff had based his

action. To which the plaintiff said, true it is that T. B. gave the tenements as above, &c.; but he said that the said W. had issue one Humphrey an older (son) and the said Richard, the younger, and died, after whose death H. entered and was seised by the form of the gift, &c., and being so seised, one T. Taltarum sued a writ of right against said Humphrey, returnable, &c.; on which day the parties appeared, and said Taltarum counted on his possession, and the said H. made defense, and vouched to warranty one R. King, who was ready and entered into the warranty, and joined issue on the mere right; and the said Taltarum imparled (with him) and then returned (into court) and the tenant by the warranty did not return but in contempt of court made default, by which the demandant had final judgment against said H., and he over against the tenant by the warranty; by force of which said Taltarum entered and was seised, &c.; and then said H. died without heirs of his body, &c.; and later Taltarum enfeoffed the present plaintiff, &c., whereby he was seised when the defendant entered, &c. To which the defendant said, true it is that the said W. had issue Humphrey the elder and R. the younger, and died; and that after his death the tenements descended to Humphrey as son and heir, and he entered and was seised as son and heir by the form of the gift, &c.; but he said that the aforesaid Humphrey before the writ purchased (in Taltarum's suit) enfeoffed the said tenements to one Tergos in fee, who before said writ purchased gave the tenements back to said H. and one Jane his wife to have and hold to them and to the heirs of their bodies begotten, remainder to the right heirs of said H. in fee, &c., by force of which they were seised, &c.; and later Jane died, after whose death H. was sole seised of said tenements as tenant in tail after possibility, &c.; and while he was so seised said Taltarum sued his writ of right, and recovered against said H. in manner and form as he had alleged; the which H., continually after the said judgment during his life was seised of said tenements by force of the gift to him and his wife, and died without issue; after whose death said Richard as brother and heir of said H., of the body of W. begotten, entered and was seised by force of the gift made to W., and died seised, and it descended to said J. Smith, and he entered and was seised by force of the gift, &c.; without this that the said T. Taltarum, after the said recovery in the life of the said H. entered on the said tenements as he had alleged; and without this that the said H. had any other estate in the said tenements at the day of the purchase of the writ of right or afterwards, except that by force of the gift to him and his wife, &c.; and without this that the said Taltarum was seized of the said tenements as of fee and of right at the time of the king, as he had alleged; and so the said recovery was false and feigned in law. * * *

In place of the long and confusing argument given in the original, the following synopsis of the decision is given from *Challis on Real Property* *250: "It would appear, so far as the rambling obscurity of the report allows anything to appear, that in the present case the question at issue was whether a person claiming under the original entail, which had been

discontinued by Humphery Smith's (*251) feoffment to Tergos was barred by this recovery. And it appears to have been held that he was not barred, upon the ground that Humphery Smith (who was really seised under the tortuous seisin acquired by his own feoffment to Tergos) had not been seised by force of the original entail, which was now sought to be barred, at the time when the recovery was suffered. From this the inference is deduced, that if Humphery Smith had been so seised by force of the original entail, the recovery would have been a good bar to the issue in tail claiming thereunder. And this inference being acted upon in practice, was subsequently recognized by the courts, and became the foundation of common recoveries."

ANON., before all the judges, Easter, 19 Hen. 8.—A. D. 1528—Dyer 2b.

Before all the judges at Sergeant's Inn, a great question was agitated, which was this: Tenant in tail levied a fine of his land with proclamations, and the five years passed during his life-time, and [*3a] afterwards he died. Whether his issue should be barred by this fine or not? ENGLEFIELD, SHELLY and CONINGSBY, thought that the issue shall not be barred; for the statute 4 Hen. 7, c. 24, is, that such fine shall be final, and shall conclude as well privies as strangers to it, saving to all persons and their heirs (other than such as shall be parties to the fine) their right interest, &c., which they had on the day of engrossing the fine, so as they bring their action or enter lawfully within five years after the engrossing; saving also to all other persons such right, title, and interest in the said tenements as should first grow, remain, descend, or come to them after the fine engrossed, or proclamations made by force of any estate-tail, or other cause and matter made before the fine levied; so by this last saving, &c., the issue in tail is aided, for he is the first to whom the right descends after the fine engrossed. * * *

FITZJAMES, BRUNDEL, FITZHERBERT, BROOKE, and MOORE, to the contrary, for the intent of those who made the statute was (as appears by the words of the said statute) that such fine, &c., should be a final end; and besides that such fine, &c., shall conclude as well privies as strangers. * * * And the intention of the makers of the statute was, not that such as claim by the same title that his ancestor, who levied the fine, had, shall be aided, &c., for such issue in tail is privy to the fine levied by his ancestor, through whom he shall make his descent, although he be not party to the fine, and all privies are concluded by such fine; and so such issue in tail shall be barred by a fine by his ancestor, &c. And in this case it was agreed by all the judges, that if he who is a stranger to the fine, to whom a remainder in tail, or other title, first accrues after the fine, do not put in his claim within five years after, &c., his issue is barred by that fine forever. Which note

To settle the doubt raised by this divided opinion, and to confirm the opinion of the majority in this case (see Hargrave's note 1 to Coke Lit. 121a), it was enacted in 1540, by the Statute of Fines of 32 Hen. VIII, c. 36, § 1, among other things, as follows:

"That all and singular fines, as well heretofore levied as hereafter to be levied before the said justices with proclamations according to the said statute [4 Hen. 7, c. 24], by any person or persons of full age of one and twenty years, of any manors, lands, tenements, or hereditaments, before the time of the said fine levied in any wise entailed to the person or persons so levying the same fine, or to any the ancestor or ancestors of the same person or persons in possession, reversion, remainder, or in use, shall be immediately after the same fine levied, engrossed, and proclamations made, adjudged, accepted, deemed, and taken, to all intents and purposes, a sufficient bar and discharge forever, against the said person and persons and their heirs claiming the same lands, tenements, and hereditaments, or any parcel thereof, only by force of any such entail, and against all other persons claiming the same or any parcel thereof only to their use, or to the use of any manner of heir of the bodies of them; any ambiguity, doubt, or contrariosity of opinion, risen or grown upon the said statute, to the contrary notwithstanding."

JACKSON & DARCYES CASE, in Common Bench, Mich. 16 Eliz.—A. D. 1574. 3 Leon. 57.

In a writ of partition *facienda* between Jackson and Darcy, the case was: tenant in tail, remainder to the king, levied a fine, had issue, and died; in that case, it was adjudged that the issue was barred, and yet the remainder which was in the king was not discontinued; for by that fine, an estate in fee-simple determinable upon the estate tail, did pass unto the conusee.

MARY PORTINGTON'S CASE, in C. B., Trinity, 11 James 1, A. D. 1614—Abridged from 10 Coke 35 b.

Speaking of this case in the preface to the report, Lord Coke said: "Then have I published in Mary Portington's case, for the general good both of the prince and country, the honorable funeral of fond and new-found perpetuities—a monsterous brood carved out of mere invention, and never known to the ancient sages of the law. I say monsterous, for that the naturalist saith, *quod monstra generantur propter corruptionem alicujus principii;* and yet I say honorable, for these vermin have crept into many honorable families. At whose solemn funeral I was present, accompanied the dead to the grave of oblivion, but mourned not, for that the commonwealth rejoiced, that fettered free-holds and inheritances were set at liberty, and many and manifold inconveniences to the head and all the members of the commonwealth thereby avoided."

[Trespass by Mary Portington against Robert Rogers and Thomas Barley for breaking a close and house in York County. Defendants pleaded in bar, that Herceus Sanford, being seised in fee in socage of the land devised it in writing to Elizabeth, his youngest daughter, in tail, when she should be 18; that the testator died when she was five years old, and when she was of age and seized under the devise she married defendant Rogers, &c. Plaintiff replied that the testator had issue, Mary, the plaintiff, his eldest daughter, Helen, his second, and said Elizabeth, and that for want of issue of said Elizabeth, the same will limited the remainder to said Mary in tail, remainder to Helen in tail, with divers remainders over in tail; "Provided always, that if my said daughters or any of them * * * jointly or severally, by themselves

or together with any other person or persons, willingly, apparently, and advisedly conclude and agree to" any act to alienate the land or bar or destroy the entails, such person shall immediately lose and forfeit and be utterly barred and excluded from every estate, remainder, and benefit that she or they might claim by virtue of the will, immediately from such act as if she or they were dead without heirs; and that said Elizabeth and Robert had bargained for and suffered a recovery; wherefore the plaintiff entered for the said forfeiture, as in her remainder. Upon which the defendant demurred. This Plea was entered, Mich. 7 James, in the common bench, and had depended fourteen terms and been argued at the bar more than half as many times; and now it was argued by the judges, and at last unanimously resolved by the whole court that judgment should be given against the plaintiff.]

On the Plaintiff's Part divers objections or rather declamations were made: 1. That from the time of the making of the act of 13 Edw. 1, c. 1, *de Donis Conditionalibus,* till *Taltarum's Case,* 12 Edw. 4, 19, there was no opinion that a recovery against the tenant in tail with voucher over would bind the estate tail on the pretense of a feigned recompence; but 12 E. 4 it was newly invented, and never before that time imagined by any of the sages of the law, in so many generations and ages incurred after the said act. 2. Although the donor cannot restrain the common recovery after it is suffered and executed (because then the reversion or remainder is barred, &c.) yet (as it was agreed on the other side) he may restrain the conclusion and agreement to suffer, and so prevent the bar by the recovery, and preserve his remainder or reversion. 3. Such recoveries are by divers acts of parliament marked and branded with the blemish of fiction and falsity, as in 34 H. 8, c. 20, they are styled feigned and untrue recoveries; and so in 11 H. 7, c. 20; 32 H. 8, c. 31; 14 Eliz. c. 8, &c. And therefore it stands with law and reason to provide for the preservation of reversions and remainders against such feigned, false, and covinous recoveries. 4. That this opinion that a common recovery cannot be restrained by condition or limitation was new and of late invention, and never heard of before, *Sir Anthony Mildmay's Case,* 6 Coke 40a [post —]. For it was admitted to be restrained in the *Case of the Earl of Arundel* (17 Eliz.), Dyer 242, 243; where the said earl in the time of Queen Mary gave the manor of Haselber Bryan, in the county of Dorset, by indenture, to Thomas (late Earl of Northumberland) and to the heirs males of his body, upon condition that if said earl or the heirs male of his body issuing (among others) shall suffer any to recover against them, or shall discontinue; and in the argument of *Scholastica's Case* (12 Eliz.) Plow. Com. 403 [post—] the said point of restraint of a common recovery was never moved.

And therefore it was thought to stand with the honor and gravity of the court, that this point had been so often argued at the bar; and therefore, now the sergeants said that it was ripe for judgment after

such mature deliberation. And in this case all the said objections were confuted, and thereby the point in judgment confirmed.

As to the first, two questions were moved and resolved: 1, that judgment given against a tenant in tail with voucher and recompenee in value, would bind the estate tail, notwithstanding the said act of 13 Edw. 1, c. 1, be the recovery upon good title or not; 2, that the judgment given in such case for the tenant in tail to have in value, would bind the estate tail, although no recompense be had.

And therefore as to the first of these questions: It appears by our books, that the opinion that a recovery against tenant in tail with voucher would bar an estate tail, and was not restrained by the statute *de Donis Conditionalibus* was not newly invented in 12 E. 4, but often affirmed for law by the most knowing of the law that ever were; for Sir Wm. Thirning in the time of Hen. 4, C. J. of the Com. Pl., anno 12 Hen. 4, 13 b, saith that the most learned of the law that ever were, were in the reign of Edward 3, which also were near the making of the statute. Let us see then how the law was held in their days on this point. By 15 Ed. 3, Brief 324, by recovery in value by the tenant in tail the estate tail is barred, and he shall have a formedon of the land so recovered in value. And therewith agrees 42 Ed. 3, 53; for there it is held that in some case a man shall have a writ of formedon of land which was never given—as if tenements in tail be lost, and the tenant in tail recover other land in value, the issue shall have a formedon of the land recovered in value, and yet that land was not given. In *Octavian Lombard's Case,* 44 Edw. 3, 21, 22, tenant in tail grants a rent charge to one in consideration that the grantee having right to the land in tail releases to him, it shall bind the issue in tail. In *Jeffery Bencher's Case,* 48 Edw. 3, 11 b, a recovery in value by tenant in tail shall bind the tail, and a formedon lies of the land recovered in value; and therewith agree 1 Ed. 4, 5; 5 Ed. 4, 2b. And that also appears by the like cases: For if a tenant in tail aliens with warranty, and leaves assets to descend it is a bar to the issue, by reason of the warranty and assets descended; but neither the warranty without the assets, nor the warranty and assets without judgment in a formedon shall bar the estate tail * * *; and therewith agree Temp. Ed. 1, tit. Garr. 89; 34 Ed. 1, tit Garr. 88; 11 Ed. 2, tit. Garr. 83; *Hen. Sommer's Case,* 4 Ed. 3, 24; 3 Ed. 4, 14; 40 Ed. 3, 9; 14 Hen. 4, 39a; 24 Hen. 8, Br. Tail 33; 4 Mary, Dyer 139. And in the case of a common recovery there is a judgment against the tenant in tail, and another judgment against the vouchee to have in value; and therefore these resolutions and opinions of law produced the judgment in *Taltarum's Case,* 12 Ed. 4, which was not of any new invention, but proved and approved by the resolutions of the sages of the law at all times after the said act until 12 Ed. 4; and the judges of the law then perceiving what contentions and mischiefs had crept into the quiet of the law by these fettered inheritances; upon consideration of the said act, and of former expositions thereof by the sages of the law at all

times after the said act, gave judgment that in such case the estate tail should be barred. * * *

As to the second objection, it is absurd to say, that the recovery itself cannot be prohibited by any condition or limitation and yet that the conclusion and agreement to suffer a recovery shall be prohibited; and such condition to prohibit a conclusion or agreement savors of a new device or invention; for till now of late, none ever heard of any condition or limitation to prohibit *goings about,* nor any conclusion or agreement, but they are altogether unknown to the law. And therefore the said act of Westm. 2 [c. 1], reciting the said mischief, saith: *per factum tamen et feoffamentum eorum quibus tenementum fuit datum sub conditione exclusi fuerunt, &c.* So that the makers of the said act ought to be taxed with great ignorance, and that the act was not necessary, if the going about or conclusion to alien might have been prohibited; for then when a man had made a gift to one and the heirs of his body, he might have added the condition that if the donee in tail at the common law after the donation had gone about or concluded to alien, that then the donor should re-enter, and so have preserved his possibility of reverter. * * *

As to the third objection and aspersion of a scandal upon common recoveries, which is one of the main pillars which supports the estates and inheritances of the kingdom, it was answered that there was never anything by the wisdom of man so well devised, or so surely established upon law and reason, which the wit and craft of those who are subtle and wicked has not abused. * * * In the great case betwixt T. Vernon and Sir. Ed. Herbert, which was argued by learned counsel before the lords in parliament, there Hoord, an utter barrister of counsel with Vernon, who was barred by a common recovery, rashly and with great ill will inveighed against common recoveries, not knowing the reason and foundation of them; who was with great gravity and some sharpness reproved by Sir James Dyer, then chief justice of the common pleas; who said he was not worthy to be of the profession of the law, who durst speak against common recoveries, which were the sinews of assurances of inheritances, and founded upon great reason and authority; *sed non omnis capit hoc verbum.* And as to *Scholastica's Case,* I respect much the reporter, and attribute due honor and reverence to the judges who argued in the case; but *amicus Plato, amicus Socrates, sed magis amica veritas;* for the resolution in the said case is founded upon two authorities in law (one 29 Assize pl. 17, and the other in Fitzh. Nat. Brev. 201, c.), which authorities being duly considered do not warrant the collection or conclusion which is made upon them *arguendo* in the said case, but to say the truth the contrary. * * *

The Rule in Shelley's Case.

ABEL'S CASE in Common Pleas, Mich. term, 18 Edw. II.—A. D. 1325—Year-books (Maynard) 18 Edw. II, f. 577. Abridged.

John Abel, having two sons, Walter and John, purchased the manor

of Fortysgray in Kent; to hold to himself and Matilda his wife, and Walter Abel, his eldest son, and to the heirs of the body of Walter begotten; and, if Walter died without heir of his body, the manor should remain to the right heirs of John the father. Matilda, the wife, died; and Walter, the son, also died without heir of his body. John, the father, became bound in a statute merchant to pay £100 to B. at a day certain; and died, leaving his younger son John his heir. After the day of payment was elapsed the creditor sued out a writ to the sheriff of Kent, to extend and deliver to him all the lands which John Abel the father had, on the day of acknowledging the statute. The sheriff returns, that he had delivered to other creditors upon recognizances all the lands which John Abel had in fee, except the manor of Fortysgray, in which he had only an estate for term of life. Upon this return it was argued, that John the father had only the freehold for term of life, the fee simple being limited to his heirs, who therefore took by purchase and not by descent. But the court held the contrary; for which this reason (among others) is given by Stonor, J. viz., because otherwise the fee and the right after the death of Walter, the eldest son, would have been in nobody. And therefore Bereford, C. J., gave the rule, that execution should be awarded upon this manor of Fortysgray.

ANON., in C. B., Trinity, 6 Eliz.—A. D. 1564—1 And. 42, pl. 105.

Grandfather, father, and son; and land held of the king *in capite* by knight-service was given to the grandfather for life, remainder to the father for life, remainder to the son for life, remainder to the right heirs of the grandfather, father, and son. The grandfather died, and the question was whether the father should sue livery; and the opinion of the justices of the common bench was that the father need not sue livery; for he and his son had the fee-simple by survivorship and not by descent.

BRETT v. RIGDEN, in Common Bench, Trinity term, 10 Eliz.—A. D. 1568—1 Plowd. Com. 340-346.

[Abridged statement of facts. Replevin by Thomas Brett against John Rigden, for three cows taken Dec. 5, 6 Eliz., in Linnets and Colnets at Kingsnoth in Kent. Defendant pleaded that Giles Brett, being seized in fee of 10 acres called Clatches-farm, in Kingsnoth, held by fealty only, made his will in writing June 15, 1556, by which he devised to his brother's son Henry Brett and his heirs all his lands and tenements at Kingsnoth or elsewhere in Kent; and afterwards H. Clerk, being seized in fee of 12 acres in Kingsnoth, held by fealty only, made feoffment of it to said Giles Brett and his heirs; and afterwards said Henry Brett had issue Thomas Brett and afterwards died, April 19, 1559, in the lifetime of said Giles Brett; who afterwards said in the presence of said Thomas and others that said Thomas should be heir to said Giles, and should have the lands which said Henry would have had by said will had he survived said Giles; and afterwards said Giles,

being still seized of all said lands, died, without issue, Oct. 1, 1561; and afterwards said Thomas entered on said lands by authority of said will and said saying of said Giles, and being so seized, demised the said lands to the defendant herein for term of two years, Oct. 1, 1562; by virtue of which the defendant entered, and being so possessed, found the said cows on the said lands eating the grass and doing damage, wherefore he took the cattle, and justly, &c. Upon this the plaintiff demurred; and three points were argued: 1, whether the will included the 12 acres purchased by the devisor after he made his will; 2, whether Thomas could take by virtue of the devise to Henry and his heirs, he being heir of Henry; 3, whether the devisor's saying that Thomas should be his heir and have the lands availed Thomas. *Loveless* for the plaintiff. *Manwood* for the defendant.]

As to the first point, *Manwood* held, that by the words in the devise of all his lands and tenements, as well the 12 acres as the 10 acres should pass. For, he said, it is to be presumed that no subject of this realm is misconusant of the law whereby he is governed. For ignorance of the law excuses none, and for as much as in indifferent matters, everyone shall be presumed to know the law according to his duty, from thence it follows that in a last will, it shall be presumed that every man is conusant of that which the law has ordained touching the same, viz., that it is of no effect until the death of the testator, at which time only it begins to operate, for by the death of the testator the will is consummate, and that which is written in his lifetime is of no force, but the precedent death alone makes the will effectual. The words of the will therefore are to be considered, and here we ought to put such construction upon them as the precedent death of the testator permits and allows; for the death of the testator is precedent, and the construction of the words of his will is subsequent, which ought to be made in such manner as if the words had been spoken at the last instant of his life, and as if the testator himself had expressed in what manner they should be construed after his death. And then when he gave to another all his lands and tenements and well knew that the word *all* must receive some construction and exposition after his death, it shall be taken for "all that he had at the last instant of his life," at which time his death commenced; for before this last instant the will does not take effect, nor shall the words be adjudged to be spoken, and it shall be presumed that he knew the law to be so. And so it shall be taken that he gave all his lands and tenements which he had at the time when his life ended and his death commenced; and it shall be presumed that his intent was such, forasmuch as he shall not be deemed misconusant of the time when the law adjudges wills to take effect. So that the testator shall not be intended misconusant of the law in this point, and neither the date of the will nor the time of its being written is to be considered, inasmuch as that time is not material nor gives essence to the will. And therefore if a man makes his will the 1st day of May, and thereby gives to another the manor of Dale in fee-simple, and the 10th day of May

one of the tenancies escheats to the manor, and the 20th day of May the devisor dies, now the devisee shall have the tenancy escheated, for the will takes effect at the time of his death, at which time it was parcel of the manor; and yet if we should only regard the date of the will, and expound it according to that time, and not according to the time of the death, the tenancy escheated should not pass, for then the devisor had no estate in it; but the date is not to be considered. For if a feme sole makes her will the 1st day of May and gives land thereby, and afterwards, the 10th day of May, she takes husband, who dies the 20th day of May, and afterwards the woman dies the 30th day of May, the devise is good; and yet if it should be considered according to the time of the date, the will would be countermanded by the espousals; but it is not so, for it does not take effect until her death, at which time she was discovert, as she was at the time of making the will, and the intermarriage shall not countermand that which was of no effect in her lifetime. Another reason he urged from the generality of the words, for by the gift of all his lands and tenements no exception was intended. So that the latitude of the devisor's intent appears from the latitude of the words. For if a man makes his will the 1st day of May, and thereby he devises to another all his plate, and he buys more plate the 10th day of May, and dies the 20th day of May, the devisee shall have all his plate which he had at the time of his death, for the largeness of the words declares his intent to be that they shall be taken beneficially for the devisee. So here the devise of all his lands and tenements implies a large and benevolent intent towards the devisee, and therefore as well the 12 acres as the 10 acres shall pass to the devisee. And he said many other things to enforce this point.

But *Loveless and all the* JUSTICES argued to the contrary. For the making of a testament consists of three parts, as do all other human acts which are done with discretion, viz., inception, progression, and consummation. Inception is the writing of the testament, and this is the first part; progression is the publication of it, in which it commences, and this is the second part; the death of the testator is the consummation of the will, and this is the third part, which being done, the act has its perfection. But there is one same thing annexed to each of these parts, and that is the intent of the party; for every one who does any act with discretion has an intent in the inception of it, for no man begins a thing but to some end or purpose. And in the progression and consummation of it the same intent also subsists, so that one same intent runs through all the parts, and continues in the doing of them. Then when Giles Brett wrote his will, and thereby gave all his lands and tenements, and at that time he had no more than 10 acres, what was his intent therein? Certainly no other but that the devisee should have those 10 acres; and when he afterwards purchased 12 acres more, it could not possibly be his intent that those should pass, for there is nothing in the will that intimates such intent, and it is to be presumed that the testator apprehended he would die at the time when the will

was written and published. So that he could not have any intent to give that which he had not, nor was there any presumption that he would afterwards have them. And therefore in the commencement of the will there does not appear to be any kind of intent that the 12 acres should pass, and when he published that which was written as his will, and that too before the purchase of the 12 acres, this publication carries with it the same intent which the testator had in the commencement of the will, and therefore it is as void of any intent to pass the 12 acres as the commencement was, and when he died, whereby the will became consummate, that consummation was agreeable and consonant to the first intent. For if the commencement of the will should have one intent, and the consummation of it another, then would it be consummate in that which was never intended at the beginning, which is incoherent and incongruous in itself, and by no means agreeable with acts of discretion, and therefore it shall not be so taken here. For which reason the intent of the testator, which subsisted in the making of the will, and in the publication of it, and in its consummation, excludes the devisee from having the 12 acres. And *Loveless* said that *testamentum est testatio mentis,* and of these two words it is compounded; but here there does not appear any evidence of his mind (which is no other than his intent) that the 12 acres should pass. And to prove that the commencement is to be regarded in wills, he put this case, viz., if a feme covert makes her will and thereby gives land devisable by the common law, and publishes her will, and afterwards her husband dies, and after that she dies, the devise shall be void, because the consummation is founded upon the first parts, viz., the making and publishing, which are void, and yet at the time of her death she was discovert, but the death cannot give effect to the will, unless the commencement be good. So it is if an infant makes a will and publishes it and dies at full age, it is of no effect, *causa qua supra.* Wherefore, the commencement and intent is to be respected in all acts. * * * But if after the purchase of the 12 acres he had newly published the will, there perhaps it would have been otherwise, for by the new publication it shall be taken to be his intent that all which the words contain at the time of the publication should pass, and the words contain that the devisee should have all that the devisor then had. But he said if a man devises land in certain, as the manor of Dale, or Whiteacre, and has nothing in it at the time of making the will, and afterwards he purchases it, there it shall pass to the devisee: for it shall be taken that it was his intent to purchase it, and if it should not pass, the will would be void to all intents. But in our case when the devisor had 10 acres and he gave all his lands, the words *all his lands* are satisfied in the passing of the 10 acres, and so they shall take effect; and as to the other 12 acres, there are no words which show his intent to extend them, as there are when the thing is particularly named, as the manor of Dale, or Whiteacre; so that there is a plain diversity between the cases. And the LORD DYER [C. J.] said that by the statute of 32 [c. 1] and 34 Hen. VIII [c. 5] it was intended that

the devisor should be seized of the lands devised at the time of making the will, for the words are, that *every person having or that* after the act *shall have any lands or tenements, &c., shall have full and free liberty to devise them by his testament,* &c.; wherefore, inasmuch as the devisor had not the 12 acres at the time of making the will, it is out of the words of the act. And he and all the other justices were of opinion that the 12 acres should not pass.

As to the second point *Manwood* said, that although Henry, the devisee, died in the life of the devisor, yet the devise should not be void, but should vest in the heir of the devisee, who was included in the devise; for when the devise was to Henry and to his heirs, it was the will of the devisor that the heir should have it. But perhaps it may be objected that it was his intent that the heir should not have it immediately but mediately, viz., by descent. Possibly he did intend that the heir should have it mediately, nevertheless his intent was that he should have it some way or other, and if he cannot have it immediately he shall not have it at all; and to say so, would be more contrarient to the will of the devisor than to say that he should have it immediately, for the one way he should not have it at all, and the other way he should have it, but not in the same form. And in wills the intent or effect is more to be regarded than the form; for the effect is, that the heir shall have it, and the form of the limitation is that he shall have it by descent. And sooner than the form and effect shall perish altogether, the effect shall take place, and the form shall perish, which is more agreeable to the will of the devisor and to sound reason. As if a man devises land to A for life, the remainder in tail to B and A dies in the life of the devisor, B shall take it in tail, and yet the words and intent of the devisor were that B should not take the land in possession immediately, but should have the remainder in tail therein, and that A should have the possession; but inasmuch as by the act of God he cannot take it in that manner, he shall take it as he may, viz., the possession immediately in tail, so that the effect shall be fulfilled although the form is not. So if one devises land to the wife of J. S., J. S. dies, she takes to husband J. D., and afterwards the devisor dies, she shall take the land, and yet she is not the wife of J. S. when the devisor dies, nor shall she take it as his wife, but the intent was that she who was the wife of J. S. at the time of making the will should have it; so that the effect shall be performed, although the formal part is not strictly adhered to. And if a man devises land to Alexander Nowel, Dean of Paul's and to the chapter there and to their successors, and Alexander Nowel dies, and a new dean is made, and afterwards the devisor dies, the land shall vest in the new dean and chapter, and yet it does not vest according to the words, but according to the intent; for the chief intent was to convey it to the dean and chapter and to their successors forever, and the single person of Alexander Nowel was not the principal cause, though perhaps it was one of the causes. So here, the effect of the gift was, that the land should continue in the heirs of Henry Brett forever, and not in him

only, for he could not have the land longer than for his life. And therefore although he is one of the causes of the gift, yet the continuance of the land from heir to heir forever is the principal cause and intent of the devise. And if a man make feoffment upon condition to enfeoff two in fee at such a time, and before the time one of them dies, the feoffment ought to be made to the survivor only and to his heirs, because of the intent which appears in the condition. And if a man's intent in a condition shall be so much pursued where the words cannot be performed, *a fortiori* in a will the intent shall be observed where the words cannot. And in 21 Rich. II, Fitz. Abr. Devise 27, land was devised to one for life, the remainder for life, the remainder to the Church of St. Andrew in Holborn, and after the death of the tenants for life the parson of the church sued an *ex gravi querela,* and it was pleaded in judgment that the remainder did not take effect because the church was not *persona capax,* and upon this it was demurred, and adjudged that the devise was good and that the parson should have execution, and yet the parson was not named in the devise, but he was comprehended in it. So is the heir here, for which causes it seemed to him that the land should vest in the heir. And of this opinion also was WALSH, justice, as to this point.

But *Loveless,* sergeant, and all the other JUSTICES argued to the contrary. For it is a principle in the law that in all gifts, whether they be by devise or otherwise, there ought to be a donee *in esse* who has power and capacity to take the thing given at the time when it ought to vest. For if there be none such *in rerum natura* when the thing ought to vest, the gift shall be void. And here the thing ought not to vest in the devisee until the death of the devisor, at which time the devisee was dead, and so not *in rerum natura.* And as to the heirs being named in the gift, viz., *to Henry Brett and to his heirs,* for which reason it is alleged that they shall be contained and included in the intent of the devisor, they said that the heirs are not named there to take immediately but only to express the quantity of estate which Henry should have. For the devisor could not properly make an estate of fee simple in the devisee without mentioning his heirs. So that heirs are there named only to make a fee simple in Henry and in none other, and not to the intent to make any other than Henry take an estate by them; and they are there put to make the devisee able as well to alien the land to another as to suffer it to descend to his heir; for the descent to the heirs is but a thing subsequent to the estate of fee simple vested first in Henry Brett the devisee, and a thing at the pleasure of the devisee. And it is by no means a just conclusion that because the land should have descended to the heir of Henry if it had first vested in Henry, that therefore the heir of Henry shall take it immediately, inasmuch as his father died in the life of the devisor. For by the same way of reasoning it might be said that if Henry had died without heir, the lord should have had the land by escheat, and that the wife of Henry should have the third part because she should have been endowed if it had been vested

in Henry; and every other conclusion might be made a cause to vest the land in others, as well as the descent to vest the land in the heir. And by the same reason also it might be said that if a man devises a lease or goods to J. S., who dies, and afterwards the devisor dies, the executors of J. S. shall have them, which most certainly is not law, for they shall not have them. So that all these things which would follow by conclusion if the estate had first vested are not good causes to make things vest in others than in them only to whom they are limited. For which reason all the justices except WALSH were of opinion that the land should not vest in Thomas Brett the son.

And as to the third point, all the justices unanimously argued and agreed, that the devisor's saying to Thomas Brett the son, that he should be his heir, and should have all the lands and tenements which said Henry should have had by his last will if he had survived the devisor was of no effect in law, and that no regard ought to be given to it inasmuch as it was not written in his last will. For the said statute of 32 [c. 1] and 34 Henry VIII [c. 5] gave liberty and authority to everyone to devise his lands by his last will in writing. In which case all that can make the devise effectual ought to be in writing. And if the rest which is in writing is not sufficient to make the land pass without the words spoken to Thomas the son, then it follows that the substantial matter which should make the land pass is not written but rests in words only, and is not within the statute; for no will is within the statute but that which is in writing, which is as much as to say that all that is effectual and to the purpose must be in writing, without seeking aid of words not written. And herein all the justices agreed.

Wherefore, inasmuch as Thomas Brett the plaintiff has sued a replevin of his cattle taken and the defendant has not shown a good right or title in himself to take them, because he has not shown a good right or title in Thomas Brett the son, who was his lessor and who is a stranger to Thomas Brett the plaintiff (for if the title of his lessor is not good, the title of himself, being lessee, cannot be good), and inasmuch as his title is bad and insufficient for the reasons above shown, the justices awarded the same Trinity term in which they now argued, that the plaintiff should recover his damages. [The judgment for the plaintiff follows.]

HARTOPP'S CASE, in Court of Wards, Trinity, 33 Eliz.—A. D. 1592—Cro. Eliz. 243.

Elizabeth devised lands to several to use of Thomas, her brother, and the heirs male of his body, and in default of such issue, to the heirs female of his body, remainders over. Thomas died before the testatrix, leaving a daughter and his wife enceinte with a son born before the testatrix died. Should the son, daughter, or neither have the land?

Upon argument it was ruled by WRAY and ANDERSON, Chief Justices, KINGSMILL and MORRIS, Surveyor and Attorney of the court of wards, that neither of them should have the land; for it being devised to the use of Thomas, and he dying before the devisor, this cannot vest in the heir, for it never vested in the ancestor; for the word "heirs" is not to give the immediate estate, but by way of limitation; and if this shall vest in the heir it shall vest in him as a purchaser, which was not the intent of the devisor, and so it shall be void.

SHELLEY'S CASE, in B. R., Trinity, 23 Eliz.—A. D. 1581. 1 Coke 93b, 1 Anderson 69, Moor 136, 3 Dyer 373, Abridged from 1 Coke 93b.

Nicholas Wolfe brought *ejectione firmae* of land in Sussex against Henry Shelley, declaring on a lease to him by Richard Shelley. Plea not guilty. It was found by special verdict that Edward Shelley and Joan, his wife, being seised of the land in question, in special tail, to them and the heirs of their two bodies, Joan died, leaving by him two sons, Richard, the younger, under whom the plaintiff claims, and Henry, defendant's father, who died before defendant was born. After Henry's (Sr.) death Edward convenanted by indenture to suffer a recovery to his own use for life, then to the use of one Carill and others for 24 years, then to the use of the heirs male of the body of said Edward, with remainder in tail over. Said Edward died while the land was in possession of a tenant for years, and later on the same day the said recovery passed with a voucher over, and, immediately after judgment given *habere facias seisinam* was awarded and ten days later the recovery was executed. Edward died Oct. 9th, A. D. 1553, and Henry, the defendant, was not born till Dec. 4th following. After the death of said Edward said Richard entered and leased to the plaintiff, on whom defendant entered and ejected him.

The principal questions in the case were four: 1, whether execution may be sued against the issue in tail if the tenant in tail suffers a common recovery with voucher over and dies before execution; 2, whether the reversion is in the recoverer presently by the judgment before execution sued when a recovery is suffered while a tenant for years is in possession; 3, whether the entry by Henry was lawful under the facts of this case, and this was the great doubt in the case; and, 4, whether Richard may take as a purchaser in this case, for as much as the elder brother (Henry) had died leaving a daughter living, who was general right heir of Edward at the time of the execution of the recovery.

Anderson, queen's sergeant, and *Gawdy* and *Fenner*, sergeants, for the plaintiff, argued, that, this use originally vested in Richard Shelley, and never vested in Edward Shelley; and therefore it vested in Richard by purchase, for that which originally vests in the heir and was never in the ancestor always vests in the heir by purchase. That the use never vested in Edward is manifest, for the use ought to rise out of the estate of the recoverers, which could not arise during his life, for it was not executed during his life. This case is like the case in 5 Edw. 4, 6a, where the wife consents to a ravisher, having issue a daughter, the daughter enters by the statute of 6 R. 2, a son is afterwards born, he shall never devest it, for it vested in the daughter by purchase; so in the case agreed in 9 Hen. 7, 25a, if a lease be made to one for life, the remainder to the right heirs of J. S., if J. S. dies leaving a daughter, his wife with child with a son, the daughter claims it by purchase, and therefore the son born afterwards shall never devest it. But they relied principally upon the case in 9 Hen. 7, 25a, that if a condition descends to a daughter, and she enters for the condition broken, the son born afterwards shall

never enter upon her, and yet there she is in by descent and has the condition and right of entry as heir, which is a stronger case than ours.

It was further argued that the manner of the limitation of the use ought to be observed in this case, for it is to the heirs male of the body of Edward and the heirs male of the body of said heirs male. If *heirs male of the body* of Edward should be words of limitation, then the subsequent words would be void, for words of limitation cannot be added to words of limitation, but to words of purchase; and such construction is always to be made of a deed that all the words, if possible, agreeable to reason and conformable to law, may take effect according to the intent of the parties. If a man makes a feoffment in fee to the use of himself for life, and after his decease to the use of his heirs, the fee simple is executed; but if the limitation be to the use of himself for life, and after his decease to the use of his heirs and their heirs female of their bodies, *his heirs* in this case are words of purchase and not of limitation, for then the subsequent words would be void.

Therefore they concluded that no use could arise till execution sued, and then it vested in Richard as purchaser before defendant was born as heir of the elder son; and admitting the recovery had been executed the use first settled in Richard as a mere purchaser.

Popham, solicitor general, *Cowper* and *Coke*, for the defendant. Execution could not be sued against the issue in tail. He who vouches shall never have execution against the vouchee before execution sued against him; so that the judgment to recover over in value is not material, as this case is, unless execution may be sued against the issue, which cannot be in this case. For he who is in of an estate in possession by title paramount to a recovery shall not be bound by the same recovery; and the issue in tail in our case is in of an estate in possession which he had paramount the recovery, and therefore he shall not be bound.

For as much as the land was in lease for years, the recovery was executed by operation of law without execution; in which there is a difference between lands in possession and lands in lease for years. Because the recoverer cannot sue execution, the law will adjudge him in execution presently. Those things which lie in grant pass to the conusee immediately by a fine levied; and so in case of a common recovery. If the judgment was executed by operation of law, then the estate tail to his heirs male of his body was in Edward Shelley, and consequently the entry of the defendant was without doubt lawful.

But if execution may be sued against issue in tail, and if the recovery was not executed by operation of law in the life of Edward, still the entry of the defendant was lawful. 1. If everything be performed without laches that the parties could perform, they shall not be prejudiced by those things which the act of God made inevitable. 2. Where the heir takes anything which should have vested in the ancestor, then although it first vests in the heir and never in the ancestor, yet the heir shall take it in the nature and course of a descent. In the case here the use might have vested in Edward, and if it had vested in him Richard would have

taken it by descent, and therefore he ought to take this use in the nature and course of a descent. Otherwise it is when the remainder is limited to the right heirs of J. S. &c., for there it begins in the son by name of purchase, and never could have vested in the brother, as the book, 9 Hen. 7, 25a, cited on the other side is agreed. So it is in the case of ravishment, 5 Edw. 4, 6a, which was cited on the other side.

What is it that governs and directs the use raised after the execution was had? The answer is, the indentures. And what is their direction? That Edward shall have it, and after his death the heirs male of his body. But the indentures direct that the heirs male of the body shall take it by limitation of estate and not by name of purchase, and therefore Richard ought to have it as heir by limitation of estate and not by name of purchase; so the entry by the afterborn son of his elder brother was lawful.

Admitting the remainder had been limited to the right heirs of the body of Edward, yet Richard could not have it; for he must have both qualities, male and right heir, but the daughter of his elder brother was right heir, so he could not take by purchase. And so is the opinion of *Ellerker, J.,* expressly in 9 Hen. 6, 24a, if a man makes a lease for life, remainder to the right heirs female of the body of J. S., who has issue a son and daughter and dies; in this case the daughter shall not take the remainder, for she is not right heir female.

As to the objection that the limitation was to the heirs male of the body of Edward and the heirs male of the body of the heirs male, and so the heirs male of the body of Edward should be purchasers; the defendant's counsel answered, that it is a rule of law, that, when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, in fee or in tail, that always in such cases, "the heirs" are words of limitation of the estate, and not words of purchase. And that appears in 40 Edw. 3, 9a and b, in the *Provost of Beverley's Case;* in 38 Edw. 3, 31 b; 24 Edw. 3, 36 b; 27 Edw. 3, 87 a; and in divers other books. So inasmuch as in this case Edward Shelley took an estate of freehold, and after an estate is limited to his heirs male of his body, the heirs male of his body must of necessity take by descent and cannot be purchasers. Otherwise it is where an estate for years is limited to the ancestor, remainder to another for life, remainder to the right heirs of the lessee for years; there his heirs are purchasers. If the right heirs male should have by purchase to them and their heirs male, a violence would be done to the words and meaning of the party, for then all the other male issue of the body of Edward would be excluded to take anything by the limitation, which would be against the express words of the party.

Lastly if Richard should not take in nature and course of descent he cannot take at all; for when an estate is made to a man, and after in the same deed, to limit the quality of the estate, another limitation is made to his heirs, or to the heirs of his body; in all these cases

his heirs or the heirs of his body shall never take as purchasers. In this case the words *"heirs male of the body of Edward Shelley"* were words of limitation; and therefore his heir male cannot take as a purchaser. This proposition is proved by the reason of the book in 40 Assize pl. 19, and by the case put by Littleton § 128, that if a man grant a reversion of a seigniory by deed to J. S. and his heirs, and the grantee dies before attornment, attornment to his heirs is void, for if it should be good the heir would take by purchase under words of limitation in the grant. On the same reason *Brett v. Ridgden,* Plow. Com. 342, is a stronger case than this; for a man devised lands to a man and his heirs, and the man died before the devisor, and it was adjudged that the heir should not take by the devise, for in that case the word *"heirs"* is not named as a word of purchase, but only to limit the estate which the devisee should have. So in our case the words *heirs male of the body of Edward Shelley* are only to give him an estate tail, and not to make any other a purchaser; and therefore Richard cannot claim the land by purchase.

After the case had been argued. openly and at large, by counsel on both sides, on three several days, in the queen's bench, the queen hearing of it (for such was the rareness and difficulty of the case, being of importance, that it was generally known), of her gracious disposition, to prevent long, tedious, and chargeable suits between parties so near in blood, which would be the ruin of both, being gentlemen of good and ancient family, directed her gracious letters to *Sir Thomas Bromley,* lord chancellor of England, who was of great and profound knowledge in the law, thereby requiring him to assemble all the justices of England before him, and upon conference had between them touching the questions, to give their resolutions and judgments thereof. And thereupon the lord chancellor, in Easter term, 23 Eliz., called before him at his house, called York-house, *Sir Christopher Wray,* lord chief justice of England, and all his companions justices of the queen's bench; *Sir James Dyer,* lord chief justice of the court of common pleas, and all his companions justices of the same court; *Sir Roger Manwood,* chief baron of the exchequer, and the barons of the exchequer; before whom the questions aforesaid were moved and shortly argued by *Fenner* serjeant for the plaintiff, and by one on the defendant's part.

[*Opinion of the Judges.*] At this time the lord chancellor was of opinion for the defendant, and openly declared his opinion before all the justices, that the third question of law was for the defendant, and therefore the defendant's entry upon his uncle was lawful. But the questions were not resolved at that time, the justices desiring time to consider. Eight or nine days after in the same term, all the said justices and barons met together in Serjeants' Inn in Fleet street, for the resolution of the case, and there it was argued by them shortly; after which arguments the justices at that time conferred amongst themselves, and took further time to consider till the trinity term following. Accordingly at the beginning of trinity term, after great study

and consideration, all the justices and barons met again in Serjeants' Inn in Fleet street; at which time, upon conference amongst themselves, all the justices of England, the lord chief baron and the barons of the exchequer, except one of the puisne justices of the common pleas, agreed that the defendant's entry upon the said Richard the uncle was lawful. Four or five days after their last meeting, one of the defendant's counsel came to the bar in the queen's bench, and moved the justices to know their resolution in the case, for their resolution was not before known to the defendant nor his counsel. WRAY, C. J. answered, that they were resolved, and asked plaintiff's counsel if they could say any more, who answered that they had said as much as they could; and likewise asked defendant's counsel if they had any new matter to say for defendant, who said: "No." And then the chief justice gave judgment that the plaintiff take nothing by his bill. Because counsel on both sides were desirous to know on which of the points their resolution did depend, the chief justice openly declared, that as to the first point the greater part of the justices and barons held that execution might be sued against the issue in tail, because the right of the estate tail was bound by the judgment against the tenant in tail, and the judgment over to have in value. As to the second point, they were all agreed, that the reversion was not in the recoverers immediately by the judgment. But he said that all the justices of England and barons of the exchequer, except one of the justices of the common pleas, were agreed as to the third point, viz: that the uncle was in in course and nature of descent, although he should not have his age, nor be in ward: (1) because the original act, the recovery, out of which the uses and estates had their essence, was had in the life of Edward, to which the execution after had retrospect; (2) because the use and possession might have vested in Edward, if execution had been sued in his life; (3) because the recoverers by their entry, nor the sheriff by doing the execution, could not make whom they pleased inherit; and (4) because the uncle claimed the use by force of the recovery, and of the indentures by words of limitation and not of purchase. And it was resolved by them all that the recovery was good enough, notwithstanding the death of Edward in the morning on the same day. And judgment was given accordingly.

At the end of his report of this case, Judge Anderson says judgment was given for Henry, and agreed that he should have the land; but the reason was not published by the court. Then he adds a note, saying that Coke has now made report in print of this case with arguments and the agreements of the chancellor and judges, but nothing of this was said in the court nor in the report of the judges.

CLERK v. DAY, in B. R., Hilary, 36 Eliz.—A. D. 1593.—Cro. Eliz. 313.

The case on special verdict was, Joan Marsh devised land to Rose, her daughter, for life; and, "If she marry after my death, and have heir of her body then lawfully begotten, I will that the heir after my

daughter's death shall have the land, and to the heirs of their body begotten; and if my daughter die without issue of her body begotten, then Philip shall have it to him and his heirs." Joan died. Rose married Silly and had issue. The question was, if Rose had an estate tail or for life only?

First, it was agreed by all the judges that a devise to one and the *heir* of his body, is an estate tail, and shall go to all the heirs of her body; for *heir* is *nomen collectivum,* and one can have but one heir at a time, and this shall go from heir to heir. GAWDY and FENNER, JJ., held that Rose had but an estate for life, for so it is limited by express words that she shall have for life; and then her heir shall take as a purchaser, and it shall not execute in Rose. POPHAM, C. J., contra, for the estate is limited to the ancestor, and after limited to the heir, and shall execute in the ancestor; especially, the words being, "if she hath any heir," and therefore intended that any heir should have it. *Et adjournat.*

No judgment was entered on the roll, yet Moor (593) says the opinion of the court was given. Hale cites it as such a case in King v. Melling, 1 Ven. 214, 225. The true name of this case is Cheat v. Day. See 2 Stra. 804.

SPARK v. SPARK, begun in C. B., Mich. 40 & 41 Eliz.—A. D. 1599. Cro. Eliz. 666.

Ejectione Firmae. Upon special verdict the case was, Nicholas Spark seised in fee, by indenture let it to William Spark for 80 years, if he live so long, the remainder after his decease to the executors or assigns of said William Spark for 40 years. William Spark died intestate, his wife (now plaintiff) took letters of administration, and entered, claiming the term. The lessor (now defendant) ousted her. The sole question was whether this remainder for 40 years vested in William Spark, or failed because he had not made any executor.

All the Justices delivered their opinions severally, that this term vested in William, and that the plaintiff should have it as administratrix to him, and it should be assets in her hands; for the intention of the lessor appears, that the executors or assigns of William should have it. So by the word "assigns" it is intended that William may dispose and make an assignment thereof; and therefore it vested in him, and shall go to his executors or administrators as assigns in law, and as a thing which came to them from their testator, and not as a perquisite by themselves. WALMSLEY, J., said it never yet was questioned by any, that if these two terms had been in one clause, but that they should have vested in William as if it had been habendum for 80 years, if he lived so long, and for 40 years after his decease to his executors. But it is here demised to William for 80 years, if he live so long, remainder to his executors for 40 years; yet notwithstanding it is all one, and the executor shall have it as executor, and it shall be assets in his hands, it being in the testator to dispose of. And it was afterwards adjudged

accordingly. In this case WALMSLEY, J., said, the difference betwixt this case and *Cranmer's Case,* 14 Eliz., Dyer 309, Moore 100, is because it is there limited by way of use, and by the party himself, so he shows his own intent that it should not vest in himself, but in his executors. But here the limitation is by a stranger, wherein there is not any intention appears, but that it should vest in the lessee himself. And by this difference all the books are reconciled.

GOODRIGHT v. PULLIN, in King's Bench, Mich., 13 Geo. I.—A. D. 1727—2 Strange 729, 2 L. Raym. 437.

Special verdict in ejectment on this devise: "I, Nicholas Lisle, give and bequeath unto my wife all that my messuage or tenement called Hattersfield, to hold for the term of her natural life, and after her decease, then to my kinsman Nicholas Lisle, for and during the term of his natural life, and after his decease unto the heirs males of the body of the said Nicholas lawfully to be begotten and his heirs forever; but in case the said Nicholas die without such heir male, then I give and bequeath the said premises unto my kinsman Edward Lisle, for and during his natural life, and after his decease to the heirs males of his body lawfully begotten and his heirs forever," and for default of such heir male, remainder over. Edward Lisle, the lessor of the plaintiff claims as heir male to Edward Lisle the remainder man in the will, supposing this to be only an estate for life to Nicholas, and that therefore a recovery suffered by him and Mary (the widow) could not bar the remainders. The defendant claims as heir in fee to Nicholas.

Bootle, for the plaintiff, argued, that it appeared plainly to be the intention of the devisor, that Nicholas should take an estate for life only; for the premises are expressly limited to him for life; and if the testator had intended him an estate tail, why is this restriction?

RAYMOND, C. J. It will be a difficult thing to make this an estate for life; and the case of *King* v. *Melling*, (1 Vent. 225, 2 Lev. 58) answers all the objections as to the limitation to Nicholas for life. The word *issue* is a proper word of purchase, but the word *heirs* is always a word of limitation; and the word *heirs* being used in this case, the words *after his decease* are of no force. The words *heirs* and *heirs male* are *nomina collectiva,* and include all the heirs of the devisee, and in *Archer's Case* it was the word *next* which confined it to one particular person, for without that word, it would have been a limitation, and not a purchase. The word *his* is the word which makes the difficulty in this case; but I think that it may very properly be referred to Nicholas himself. Suppose Nicholas had had several sons; if the eldest had been made a purchaser by this will, the other sons could not have taken; and there must be stronger words than these to control the words *heirs male* and make them words of purchase. I therefore think this clearly to be an estate tail in Nicholas. FORTESCUE, REYNOLDS, and PROBYN, JJ., of the same opinion; and judgment was given for the defendant by the whole court.

PERRIN v. BLAKE, in the English Court of Exchequer Chamber.—A. D. 1771.—Hargrave's Law Tracts 489, 10 English Ruling Cases 689.

This is a feigned action of trespass brought in the Court of King's Bench by Perrin and Vaughan, as surviving trustees for Sarah, the widow of John Williams, against Hannah Blake, for forcibly entering a plantation in Jamica, with *videlicet* to lay the action in Middlesex. Defendant pleaded not guilty as to the force and claimed title under the will mentioned below. Plaintiffs replied setting up the will at length and alleging a common recovery suffered by John Williams as tenant in tail under the will and a subsequent conveyance by him to the plaintiffs. To this defendant demurred. From a judgment for defendant in the Court of King's Bench (See 4 Burrow 2579, 1 Wm. Blackstone 672), plaintiffs bring the case here by writ of error. Reversed.

This action was brought at the suggestion of the committee of the King's Privy Council to obtain an adjudication by the courts of Westminster Hall upon the point arising on the will mentioned below involved in an appeal before the Privy Council from a judgment of the Court of Appeals of the Island of Jamaica affirming a judgment of the Supreme Court of Judicature at St. Jago, Jamaica, in favor of defendant in an action of ejectment by the plaintiffs herein against the defendant herein. The committee advised that this course be pursued because Lord Mansfield, who was the only law lord then attending the Council, preferred that a question of so much importance on the land titles of all England should not be decided by his sole opinion.

The facts involved in the ejectment suit were these: William Williams, of Jamaica, Esq., being seised in fee of a plantation in that island, and having one son and three daughters, duly executed his will bearing date March 13, 1722. On February 4, 1723, the testator died, leaving issue John Williams his only son and heir, and the three daughters named in the will. His wife died March 1, 1723. In February, 1743, John came of age; and conceiving himself to be seised in fee tail under the will of his father, he immediately made such conveyance of the devised plantation in Jamaica as by the law of that island is equivalent to a common recovery here. In March following John Williams executed a settlement in pursuance of marriage articles made whilst he was under age: and by this settlement the plantation entailed by his father's will was conveyed to trustees and their heirs to the uses following: namely, to the use of John Williams for life; remainder to the use of trustees, during his life, to preserve contingent remainders; remainder to the use and intent that Sarah, his wife, if she survived him, might receive out of the premises, during her life, a clear yearly rent charge of £1000, British money, payable at the Royal Exchange, London, quarterly, with powers of distress and entry; and subject to this rent-charge to the use of John Sharpe, William Perrin and Thomas Vaughan, their executors, administrators, and assigns for 400 years, for securing the rent-charge; remainder to the first and other sons of John Williams by the said Sarah

his wife, successively in tail male; remainder to John Williams in fee. Dec. 31, 1744, John Williams died without issue, leaving Sarah his widow, and his two sisters, Bonella, the wife of Norwood Wilter, and Hannah, the wife of Benjamin Blake, his co-heirs, Anna, the other sister, having died unmarried in his lifetime. In 1745, immediately after the death of John Williams, the husbands of his two surviving sisters and co-heirs in their right entered into the plantation so devised and settled and became seised. The wife of Wilter died, leaving William Wilter her son and heir; and Benjamin Blake also died, leaving the said Hannah his widow. Both William Wilter and Hannah Blake controverted the validity of the jointure of £1000 a year to Mrs. Williams the widow, on the ground, that her deceased husband John Williams was a mere tenant for life under the will of his father, and therefore could not bar the entail thereby created. Perrin and Vaughan, (the surviving trustees of the term of 400 years), brought the action of ejectment mentioned above, to try this point.

The feigned case was several times argued before the Court of Exchequer Chamber and lastly in May 1771. After several months the judges of the Exchequer Chamber disposed of the case, each delivering a separate opinion as follows: For reversal: Lord Chief Justice Parker, Mr. Baron Adams, Mr. Baron Perrott and the Justices Nares, Blackstone and Gould. For affirmance: Lord Chief Justice De Grey. The following opinion of Mr. Justice Blackstone, according to Mr. Hargrave, is generally accepted as expressing the reason of the decision in the Exchequer Chamber:

BLACKSTONE, J. Upon the fullest consideration which I have been able to give to this case, I am of opinion, that the judgment of the Court of King's Bench is erroneous and ought to be reversed.

I conceive that the great and fundamental maxim, upon which the construction of every devise must depend, is "that the intention of the testator shall be fully and punctually observed, so far as the same is consistent with the established rule of law; and no further."—If it did not go so far, it would be an infringement of that liberty of disposing of a man's own property, which is the most powerful incentive to honest industry, and is, therefore, essential to a free and commercial country. If it went farther, every man would make a law for himself; the metes and boundaries of property would be vague and indeterminate, which must end in its total insecurity.

But there is, I will acknowledge, a distinction to be made, though too often confounded or forgotten, in what is meant by those rules of law, which must co-operate with the intention of the testator, in order to effectuate his devise. Some of these rules are of an essential, permanent, and substantial kind; and may justly be considered as the indelible landmarks of property, irrevocably established by the well-weighted policy of the law, which have stood the test of ages, and which cannot be exceeded or transgressed by any intention of the testator, be it ever so clear and

manifest. Such as, that every tenant in fee-simple or fee-tail shall have the power of alienating his estate, by the several modes adapted to their respective interests; that no disposition shall be allowed, which in its consequence tends to a perpetuity; that lands shall descend to the eldest son or brother alone, or to all the daughters or sisters in partnership. These, and a multitude of other fundamental rules of property in this kingdom, are founded on the great principles of public convenience or necessity, and therefore cannot be shaken or disturbed by any whim or caprice of a testator, however, fully or emphatically expressed. A condition not to alienate is void, when annexed to a devise in fee, or in tail: an executory devise which tends to a perpetuity, by depending on so distant a contingency as the general failure of issue, is totally null from the beginning; and no man would be suffered to direct, that his lands shall be descendible for the future to all his male issue, or only to the eldest of his female. But there are also certain other rules of a more arbitrary, technical, and artificial kind, which are not so sacred as these, being founded upon no great principles of legislation or national policy. Some of these are only rules of interpretation or evidence, to ascertain the intention of parties, by annexing particular ideas of property to particular modes of expression: so that when a testator makes use of any of these technical modes of expression, it is evidence *prima facie,* that he means to express the self-same thing which the law expresses by the self-same form of words. Thus, if a man devises his land, being freehold, to another generally, without specifying the duration of his estate, the devisee shall be only tenant for life: if he devises in like maner a chattel interest, the devisee shall have the real property: a devise to a man and his heirs shall give him the full and absolute dominion; to a man and the heirs of his body, shall give him a more limited inheritance. Lastly, there are some rules, which are not to be reckoned among the great fundamental principles of judicial policy, but are mere maxims of positive law deduced by legal reasoning from some or other of these great fundamental principles. Such as, that a man cannot raise a fee-simple to his own right heirs, by the name of heirs, as a purchase; or, to bring it home to the case now before the court, that a devise of lands to a man for his life, and afterwards in any part of the same will a devise of the same land to the heirs of his body, shall constitute an estate tail in the first devisee for life.

But some of these rules, of the second and third class, are rules of a more flexible nature than those of the preceding kind, and admit of many exceptions; whereas those admit of none. For, if the intention of the testator be clearly and manifestly contrary to the legal import of the words, which he has thus hastily and unadvisedly made use of, the technical rule of law shall give way to this plain intention of the testator. This has been clear law for four centuries at least, if not longer. It is said by the judges in 9 Hen. VI. fol. 24, that a devise is marvelous in its operations; and many instances are given, where it may countervail the ordinary rules of law. The like doctrine is to be met with in every re-

porter since; and is the same that obtained in equity for the construction of uses before the statute. In the case of uses (says Lord Bacon of Uses, 308, 8vo. edit.), the chancellor will consult with the rules of law, where the intention of the parties does not specially appear. But then, this intention of the testator, which is to ride over and control the legal operation of his own words, must be "manifest and certain and not obscure or doubtful," as was resolved by all the judges of England in *Wild's Case,* 6 Coke 16 [*post* —]. Or, according to the emphatical words of Lord Hobart 33, "the intent must not be conjectural, but by declaration plain." Which words of Lord Hobart, as they are adopted and construed by Lord Hardwicke in *Garth* v. *Baldwyne,* 2 Ves. Sen. 646, must mean, "plain expression or necessary implication of his intent. But if that intent be uncertain, if it be in *æquilibrio,* or even in suspense or doubt, then (he afterwards adds) the legal operation of the words must take effect." And most certainly his lordship has laid down and explained the rule with that sagacity and caution, which so eminently distinguished his decisions. For as, on the one hand, it would be very unreasonable to control the plain intent of a testator by technical rules, which were principally contrived to ascertain it; so, on the other hand, where the intent is obscure or even doubtful, and liable to a variety of conjectures, it is the best and the safest way to adhere to these criterions, which the wisdom of the law has established for ages together, for the certainty and quiet of property. Every testator, when he uses the legal idiom, shall be supposed to use it in its legal meaning, unless he very plainly declares that he means to use it otherwise. And if the contrary doctrine should prevail; if courts either of law or equity (in both of which the rules of interpretation must be always the same), if these or either of them should indulge an unlimited latitude of forming conjectures upon wills, instead of attending to the grammatical or legal construction, the consequence must be endless litigation. Every title to an estate, that depends upon a will, must be brought into Westminster Hall; for if once we depart from the established rules of interpretation, without a moral certainty that the meaning of the testator requires it, no interpretation can be safe till it has received the sanction of a court of justice. For how can a client or purchaser be assured that the conjectures of the most able counsel, or the most experienced conveyancer, will be in all points the same as the conjectures of the judges or the chancellor? A civilian of some eminence, Mantica, has written a learned treatise on their law, which he has entitled, *de conjecturis ultimarum voluntatum;* but I hope never to see such a title in the law of England. For, should such a doctrine ever prevail in this country, it were better that the statute of wills should be totally repealed than be made the instrument of introducing a vague discretionary law, formed upon the occasion from the circumstances of every case; to which no precedent can be applied, and from which no rule can be deducted.

The principles being thus cleared, upon which I have endeavored

to found my present opinion, I shall now proceed to state what is the legal and technical import of the words made use of in this devise; and will then consider whether there is any plain and manifest intention of the testator, to be gathered from any part of his will, which may control and overrule the legal operation of the words, and at the same time be consistent with the fundamental and immutable rules of law.

The words which are material to be considered, in the event that has happened (when stript of all embarrassment from the contingency, which never arose, of the birth of a posthumous son) are the following:—"Item, and it is my intent and meaning, that none of my children should sell and dispose of my estate for longer time than his life; and to that intent I give, devise, and bequeath all the rest and residue of my estate to my son John Williams for and during the term of his natural life; the remainder to my brother-in-law Isaac Gale and his heirs, for and during the natural life of my said son John Williams; the remainder to the heirs of the body of my said son John Williams, lawfully begotten or to be begotten; the remainder to my daughters for and during the term of their natural lives, equally to be divided between them; the remainder to my said brother-in-law Isaac Gale and his heirs during the natural lives of my said daughters respectively; the remainder to the heirs of the bodies of my said daughters, equally to be divided between them. And I do declare it to be my will and pleasure, that the share or part of any of my said daughters, that shall happen to die, shall immediately vest in the heirs of her body in manner aforsaid."

It is necessary to take notice, that Isaac Gale died in the lifetime of the testator, whereby the remainder limited to him and his heirs for the life of John Williams became, in point of law, a lapsed devise. The disposition, therefore, at the death of the testator, stood thus: "To John Williams for the term of his natural life; the remainder to the heirs of his body," without any interposing estate. The legal consequence of which is, that if this be an estate tail in John Williams, it is an estate tail in possession, by immediately uniting with the life-estate; and not an estate tail in remainder, as in the cases of *Duncomb* v. *Duncomb* (3 Levinz, 437), and *Coulson* v. *Coulson* (2 Atk. 250), it was held to be, by reason of the interposing estate, which subsisted in both these cases. And indeed, were it otherwise, the plaintiff's replication could not be supported upon this general demurrer; for therein he pleads, that "by virtue of the said will, John Williams entered into the close in question, and became seised thereof in his demesne as of fee tail, to wit, to him and to the heirs of his body issuing." How far the interposition of this estate to Isaac Gale and his heirs, though it never took effect, is an evidence of the testator's intention, will afterwards come to be considered. At present the only question is, what estate is by these words devised to John

Williams, according to the general rule of law, uncontrolled by other considerations? And I apprehend there is no doubt, but that the words, in their legal construction, convey an estate tail to John Williams.

For the rule of law, as laid down in *Shelley's Case,* 1 Coke 104, [*ante*] and recognized in Co. Litt. 22, 319, 376, is, that, "where the ancestor takes an estate of freehold, with a remainder, either mediate or immediate, to his heirs, or the heirs of his body, the word 'heirs' is a word of limitation of the estate and not of purchase;" that is, in other words, that such remainder vests in the ancestor himself, and the heir (when he takes) shall take by descent from him, and not as a purchaser. This rule, though too plain and positive to be openly questioned, or denied has yet been obliquely reflected on; and insinuations have been thrown out, that it is a strict and a narrow rule,—founded upon feodal principles, which have long ago ceased;—that in *Shelley's Case* it is only laid down *arguendo* by the counsel, and not by the court; —and that too in the case of a deed and not of a will. It will not therefore be foreign to the present question, to make a short inquiry into the reason, the antiquity, and the extent of the rule.

Were it strictly true, that the origin of this rule was merely feodal, and calculated solely to give the lord his profits of tenure (either wardship or relief) upon the descent of the heir from the ancestor, of which the lord might be defrauded if the heir was to take by purchase, of which (by the way) I have never met with a single trace in any feodal writer; still it would not shake the authority of the rule, or make us wish for an opportunity to evade it. There is hardly an ancient rule of real property, but what has in it more or less of a feodal tincture. The common law maxims of descent, the conveyance by livery of seisin, the whole doctrine of copyholds, and a hundred other instances that might be given, are plainly the offspring of the feodal system; but, whatever their parentage was, they are now adopted by the common law of England, incorporated into its body, and so interwoven with its policy; that no court of justice in this kingdom has either the power or (I trust) the inclination to disturb them. The benefit of clergy took its origin from principles of popery; but is there a man breathing that would therefore now wish to abolish it? The law of real property in this country, wherever its materials were gathered, is now formed into a fine artificial system, full of unseen connections and nice dependencies; and he that breaks one link of the chain, endangers the dissolution of the whole.

But it is by no means clear, that this rule took its rise merely from feodal principles. I am rather inclined to believe, that it was first established to prevent the inheritance from being in abeyance. For, though it has been the doctrine of modern times, in order to effectuate executory devises, that, where a limitation of the inheritance depends in contingency, an interim estate may descend to the heir until the contingency happens, yet it is manifest to any one the least conversant in our ancient books, that during the pendency of a contingent remainder in fee or in tail, the inheritance was formerly always (and in some case is to this day) held to

be in abeyance, or *in nubibus,* as they then expressed it. Thus, if a gift be made to one for life, remainder to the right heirs of J. S., then living, the fee simple is in suspense or *abeyance during the life of J. S. Bro. t. Done. 6. And so is Co. Litt. 342 b. But this state of abeyance was always odious in the law; and therefore the whole freehold or frank-tenement could not be in abeyance, except in the single case of the death of a parson, or other corporation sole. Dyer 71; Hob. 338. For in that interval there could be no seisin of the land, no tenant to a præcipe, no one of ability to protect it from wrong or injury, or to answer its burthens or services. And this is one principal reason, why a particular estate for years is not allowed to support a contingent remainder; that the freehold may not be in abeyance: as is laid down in Hob. 153.

But when the first or particular estate was a freehold, there in some cases the law allowed the inheritance to be put in abeyance, by the creation of a contingent remainder; but this very sparingly and with great reluctance. For, during such abeyance of the inheritance, many operations of law were totally suspended. The particular tenant was rendered dispunishable for waste; for the writ of waste can only be brought by him who is entitled to the inheritance. The title, if attacked, could not be completely defended; for there was no one in being, of whom the tenant of the freehold could pray in aid to support his right. The mere right itself, if subsisting in a stranger, could not be recovered in this interval; for, upon a writ of right patent, a lessee for life cannot join the mise upon the mere right. 1 Roll. Abr. 686. For these among other reasons, the law was extremely cautious of admitting the inheritance to be in abeyance, unless in very particular cases; as is laid down by Hobart and Doddridge, 2 Roll. Rep. 502, 506, Hob. 338. Indeed, where the particular estate was made to A. for life, with remainder to the right heirs of B. then living, there till the death of B. the inheritance was necessarily in abeyance; for B. the ancestor was entitled to nothing. But, where the ancestor had already an estate of freehold limited to him, the law, (to prevent such abeyance) adjudged that a subsequent remainder to his heirs (who, during his life, are uncertain) was a remainder vested in the ancestor himself, and that his heirs shall claim by descent from him. For, as Hankford, J., says in 11 Hen. IV. 74: "If land be given to a man for term of his life, the remainder in tail, and for default of issue the remainder to the right heir of the first tenant, the remainder in fee simple takes its being by the possession which the first tenant hath." And though in this case it was argued at the bar, that the fee was *in nubibus,* or in suspense, yet this was strongly denied both by him and by Hill, another of the Judges. And, indeed, if we consider it attentively, the whole of this rule amounts to no more than what happens every day in the creation of an estate in fee or in tail, by a gift to A. and to his heirs forever, or to A. and to the heirs of his body begotten. The first words (to A.) create an estate for life: the latter (to his heirs, or the heirs of his body) create a remainder in

fee or in tail; which the law, to prevent an abeyance, refers to and vests in the ancestor himself; who is thus tenant for life, with an immediate remainder in fee or in tail; and then, by the conjunction of the two estates, or the merger of the less in the greater, he becomes tenant in fee or tenant in tail in possession. Hence therefore I am induced to think, that one principal foundation of this rule was to obviate the mischief of two frequently putting the inheritance in suspense or abeyance.

Another foundation might be, and was probably, laid in a principle diametrically opposite to the genius of the feodal institutions; namely, a desire to facilitate the alienation of land, and to throw it into the track of commerce, one generation sooner, by vesting the inheritance in the ancestor, than if he continued tenant for life, and the heir was declared a purchaser. Therefore, where an estate was limited to the ancestor for life, and afterwards (mediately or immediately) to his heirs, who are uncertain till the time of his death; the law considered the ancestor as the first and principal object of the donor's bounty; and therefore permitted him (who, as it is said, Co. Litt. 22, beareth in his body all his heirs, and who had the only visible and notorious freehold in the land) to sell it, devise it where the custom would permit, or charge it with his debts and incumbrances. And however narrow and illiberal the original establishment of this rule, or the adhering to it in later times, many have been represented in argument, I own myself of opinion, that those constructions of law, which tend to facilitate the sale and circulation of property in a free and commercial country, and which make it more liable to the debts of the visible owner, who derives a greater credit from that ownership; such constructions, I say, are founded upon principles of public policy altogether as open and as enlarged as those which favor the accumulation of estates in private families, by fettering inheritances till the full age of posterity now unborn, and which may not be born for half a century.

Then as to the antiquity of the rule in question, it hath been said, that in *Shelley's Case,* it is only urged by the counsel for the defendant in their argument, and not relied on by the court. But the determination of the court is grounded on this rule, as well in *Shelley's Case,* as in the *Case of the Earl of Bedford,* Moor. 720, where the same rule is likewise argued from by the counsel as a known and undeniable maxim. And Lord Coke in his Commentary on Littleton (*the great result of all his experience*) has often adapted and relied upon it; and has cited, in his margin, to support it, a long list of authorities from the Year Books; chiefly those of Edward the Third. I have looked into all these, and into some besides; and shall only say that they do most explicitly warrant the doctrine extracted from them by that great and learned judge.

There is one case which I have never seen cited, and which is by far the earliest of any that have occurred to me upon a diligent search. In this the question before the court was, whether an estate thus circum-

stanced (that is, settled on a man for life, and after an immediate remainder in tail, to the right heirs of the tenant for life) was, on failure of the remainder in tail, liable to the debts of the tenant for life; and it was determined to be liable, upon the ground of its being a fee simple vested in the ancestor; and therefore vested in him, in order to prevent the inheritance from being in abeyance. This, I believe, is the very first case in our books, wherein this principle was established. It is in the Year Book of Edward II. published by Serjeant Maynard, M. 18 Edw. II. fol. 577. [*Abel's Case* ante 48, stating it in full] * * * The rule of law, deducible from hence, is well and emphatically collected by Fitzherbert, in his abridgment, tit. Feoffment, pl. 109, who refers (I presume) to this case (although it was not then in print) when he says, that it was resolved in M. 18 Edw. II. "that if a man give land to B. for term of life, remainder to C. in tail, remainder to the right heirs of B. in fee, this remainder in fee vests in B. as much as if the remainder was limited to B. and his right heirs in fee; and the right heir of B. shall have this by descent and not as purchaser."

And from all these authorities I infer, that the rule in question is a rule of the highest antiquity; not merely grounded on any narrow feodal principle, but applied, in the first instance we know of, to the liberal and conscientious purpose of facilitating the alienation of the land by charging it with the debts of the ancestor.

However, it hath been urged, that though the rule must be allowed with respect to estates created by deed; yet it doth not follow, that it also extend to devises: and so the master of the rolls is said to have declared (in the case of *Papillon* v. *Voice,* 2 Wms. 477) "that he knew of no case, where lands being devised to A. for life, remainder to the heirs of the body, this (in case of a will) had been construed an estate tail in A." But either the reporter has misapprehended his honor's meaning or else he had surely forgotten the cases of *Whiting* v. *Wilkins,* 1 Bulstr. 219, *Rundle* v. *Healy,* Cart 170, and *Broughton* v. *Langley,* Lutw. 814, wherein that point is resolved *in terminis.* It will therefore be sufficient to observe upon this head, that the rule in Co. Litt. 22, 319, is laid down in general terms, "where and wheresoever the ancestor taketh an estate for life, &c.," and in Co. Litt. 376, and also in *Shelley's Case,* and in Moor. 720, *Earl of Bedford's Case,* it is extended to all conveyances. And devises of land (which differ totally from testaments of chattels) are held in all our books, and particularly in *Widnham* v. *Chetwynd,* 1 Burr. 429, to be a species of conveyance; and this is the reason why lands purchased after the execution of it cannot pass by such a devise.

But, however strongly this rule may be founded in antiquity, and supported by reason and authority, I have in the outset conceded, that when it is applied to devises, it may give way to the plain and manifest intent of the devisor; provided, that intent be consistent with the great and immutable principles of our legal policy; and provided it

be so fully expressed in the testator's will, or else may be collected from thence by such cogent and demonstrative arguments, as to leave no doubt in any reasonable mind, whether it was his intent or no. Which leads me to the last consideration. Whether there is any such plain and manifest intent of the devisor, expressed in or to be collected from any part of this devise, as may control the legal operation of the words, and at the same time be consistent with the fundamental rules of law? And I am of opinion, that there is no such plain intent.

In order to decide this question clearly, it is necessary to state it accurately. And first, let us see what the question is not. The question is not, whether the testator intended that his son John should have a power of alienation. If that was all, the dispute would be soon at an end; for his intention is most clearly expressed (and it is the only clear intent I can find) that the son should not have such a power. And, if a conveyance were now to be directed of this estate by a court of equity, it would probably be in strict settlement, according to the case of *Lennard* v. *Earl of Sussex*, 2 Vern. 526. But that and all similar cases (of directing a conveyance by a court of equity) must be laid out of the present question; for we are now in the case of a legal estate, executed either one way or the other, and not of an executory trust. And if the testator has in fact devised an estate to John, with which such a restriction of alienation is incompatible by the fundamental rules of law, the restriction is null and void. Again: the question is not, whether the testator intended that his son John should have only an estate for life. I believe there never was an instance, when an estate for life was expressly devised to the first taker, that the devisor intended he should have anything more. But if he afterwards gives an estate to the heirs of the tenant for life, or to the heirs of his body, it is the consequence or operation of law that in this case supervenes his intention (as Lord Hale expresses it, 1 Ventr. 225, 379), and vests a remainder in the ancestor: which remainder, if it be immediate, merges his estate for life, and gives him the inheritance in possession: but if mediate only, by reason of some interposing estate, then it vests the inheritance in the tenant for life, as a future interest, to take effect in possession when the interposition is determined. And therefore it has been frequently adjudged, that though an estate be devised to a man for life only, or for life *et non aliter* or with any other restrictive expressions; yet, if there be afterwards added apt and proper words to create an estate of inheritance in his heirs or the heirs of his body, the extensive force of the latter words shall overbalance the strictness of the former, and make him tenant in tail or in fee. These therefore are not the true questions in the present case.

But I apprehend the true question of intent will turn, not upon the quantity of estate intended to be given to John the ancestor; but upon the nature of the estate intended to be given to the heirs of his body. That the ancestor was intended to take an estate for life, is certain: that his heirs were intended to take after him, is equally certain: but

how those heirs were intended to take, whether as descendants, or as purchasers, is the question. If the testator intended they should take as purchasers, then John the ancestor remained only tenant for life. If he meant they should take by descent, or had formed no intention about the matter, then, by operation and consequence of law, the inheritance first vested in the ancestor. The true question therefore is,—Whether the testator has or has not plainly declared his intent, that the heirs of the body of John Williams shall take an estate by purchase, entirely detached from and unconnected with the estate of their ancestors? or, in other words, Whether he meant to put an express negative on the general rule of law which vests in the person of the ancestor (when tenant of the freehold) an estate that is given to the heirs of his body? But, in order to say this, we must suppose, that the testator was apprised of this rule, and meant an exception to it; of which there is no evidence whatsoever. And here lies the great difficulty, which the defendant in error must encounter. It is not incumbent on the plaintiff to show, by any express evidence, that this testator meant to adhere to the rule of law; for that is always supposed till the contrary is clearly proved: but it is incumbent on the defendant to show, by plain and manifest indications, that the testator intended to deviate from the general rule; for that is never supposed, till made out, not by conjecture but by strong and conclusive evidence.

Let us therefore see what evidence has been usually required to demonstrate such a devious intention, and what the evidence is that is relied on in the present case. I am far from maintaining, that by a devise to a man's heirs or the heirs of his body, they shall never take as purchasers in any case. But I have never observed it to be allowed, excepting in one of these four situations; not one of which will apply to the present case.

1. *Where no estate at all, or* (which is the same thing in the idea of our ancient law) where *no estate of freehold is devised to the ancestor.* Here the heirs cannot take by descent, because the ancestor never had in him any descendible estate. And this must always be the case, where the ancestor is dead at the time of the devise, as in the known case of *John de Mandeville* (Co. Litt. 26), the heir then taking a vested estate by purchase. It is also the same, if the ancestor be living and has no sort of estate devised to him; only that then the estate of the heir is contingent, because *nemo est haeres viventis.* And, if the ancestor has only the devise of a chattel interest, with a subsequent estate to his heirs, the heirs must likewise take as purchasers, or not take at all. For, if between the term of the ancestor and the estate of his heirs, there is no vested freehold remainder, the heirs can only take by way of executory devise; which, *ex vi termini,* implies an estate not executed in the ancestor. Or, if there be any such vested estate of freehold, interposed between the ancestor's term and the contingent remainder to his heirs, that contingent remainder is supported entirely

by the interposed estate, and does not derive its being or any degree of assistance from the chattel estate of the ancestor.

2. The next case is, *where no estate of inheritance is devised* to the heirs; as in the case of *White* v. *Collins,* Com. 289 (cited by the counsel for the defendant). There the devise was to Frank Mildmay for life, with a power of jointuring, and after his death (and jointure, if any be) to the heir male of his body lawfully begotten, during the term of his natural life; remainder over. Common sense will here tell us, that when no estate of inheritance is devised to the heir male of the body, he cannot take by descent as heir.

3. The third case is, *where some words of explanation are annexed* by the devisor himself to the word heirs, in the will; whereby he discovers a consciousness, distrust, or apprehension that he may have used the word improperly, and not in its legal meaning; and therefore he in a manner retracts it, he corrects the inaccuracy of his own phrase, and tells every reader of his will how he would have it understood. Thus, in *Burchel* v. *Durdant,* (2 Ventr. 311, Carth. 54), the devise was, "in trust for Robert Durdant for life, and after his decease to the heirs male of his body, now living." As if the testator had said, "I do not mean a perpetual succession in the male line of Robert Durdant, which perhaps may be the legal sense of heirs male of his body; but I mean by that expression only such of his sons as are at present born and known to me." And accordingly the court held that George Durdant, the son of Robert, and living when the will was made, should take the estate as a purchaser. So in *Lisle* v. *Gray* (2 Lev. 223), the words were, "to Edward for life remainder to his first, second, third and fourth sons in tail male; and so to all and every other the heirs male of the body of Edward." Which words "and so" (together with the manifest reason of the thing) plainly showed that the "other heirs male of the body" in the subsequent clause of the will, were to be understood just so as the "first, second, third and fourth sons" were to be understood in the preceding. And in *Lowe* v. *Davis* (Lord Raym. 1561), when the testator had first devised, in a loose unguarded manner, to "his son Benjamin and his heirs lawfully to be begotten," he immediately recollects himself and adds, by way of explanation, "that is to say, to his first, second, third, and every other son and sons successively, lawfully to be begotten of the body of the said Benjamin, &c." This devise to the heirs, thus explained was held to be by way of purchase. So in the case of *Doe on demise of Long* v. *Laming,* (Burr. 1100), the devise was of gravelkind lands, "to Anne Cornish and the heirs of her body begotten, as well female as male, to take as tenants in common." Now, since gravelkind lands cannot descend to heirs female as well as males (as is expressly declared by the statute *De Prærog. Regis,* 17 Edw. II. c. 16), nor can heirs, as such, be tenants in common but coparceners, it is clear, that by the words heirs of the body (thus explained by the words female as well as male, and to take as tenants in common), the devisor could only mean to describe the children of Anne Cornish.

4. The last case, wherein heirs of the body have been held to be words of purchase, is *where the testator hath superadded fresh limitations,* and grafted other words of inheritance upon the heirs to whom he gives the estate: whereby it appears, that those heirs were meant by the testator to be the root of a new inheritance, the stock of a new descent; and were not considered merely as branches derived from their own progenitor. Where the heir is thus himself made an ancestor, it is plain, that the denomination of heir of the body was merely descriptive of the person intended to take, and means no more than "such son or daughter of the tenant for life, as shall also be heir of his body." The cases of *Lisle* v. *Gray,* and *Lowe* v. *Davis* and *Long* v. *Laming,* fall under this head as well as the other; these having also words of limitation superadded to the word heirs, as well as the explanatory words I before took notice of. Thus too in *Cheek* v. *Day* (which, as Lord Raymond observes, Fitzg. 24, Fortesc. 77 is the true name of the case usually called *Clerk* v. *Day*), the devise, as there cited from the roll, was "to my daughter Rose for life, and if she marry after my death, and have any heirs lawfully begotten, I will that her heir shall have the lands after my daughter's death, and the heirs of such heir." So likewise *Archer's Case,* 1 Coke, 66, is "to the right and next heir." of Robert Archer (the tenant for life), and to the heirs of his body lawfully begotten for ever." And the case of *Backhouse* v. *Wells,* 2 Wms. 476, is "from and after the decease of the tenant for life to the issue male of his body, and to the heir male of such issue male."

All the cases therefore that have hitherto occurred, from the statute of wills to the present time (a period above two centuries)—all the cases, I say, in which heirs of the body have been construed to be words of purchase, are reducible to these four heads: either where no estate of freehold is given to the ancestor; or where no estate of inheritance is given to the heir; or where other explanatory words are immediately subjoined to the former; or, lastly, where a new inheritance is grafted on the heirs of the body,—none of which is the present case. We have therefore no authority from precedents to warrant such a construction as is now contended for. I do not however say, that this construction can never be made under other circumstances than those which I have now mentioned, but only that at present I am not aware of any other circumstances that can warrant the same construction. At the same time I allow, that the same construction may and ought to be made, whenever the intent of the testator is equally clear and manifest.

What then is the evidence of this intention in the present case? It may be resolved into two particulars: 1. The testator's previous declared intention, "that none of his children should sell or dispose of his estate for longer term than his own life," together with his consequent disposition "to that intent;" and, 2, The interposed estate of Isaac Gale, and his heirs, during the life of the testator's son. For, as to what was mentioned at the bar, of his making the daughters and the heirs of their bodies tenants in common, and directing the share of

each daughter immediately upon her death to vest in the heirs of her body;—that is plainly done to prevent the inconvenience of survivorship among the daughters; which must otherwise have been the consequence, according to the rules laid down, Co. Litt. 25 *b*, that "where there is a gift to two women, and the heirs of their bodies, they have a joint estate for life, and several inheritances."

Nor indeed do I think much stress can be laid on the second particular, the interposed estate of Isaac Gale, and his heirs. For had that been expressly created to preserve contingent remainders, the case of *Coulson* v. *Coulson* (2 Atk. 250), is an express authority, that this will not make the heir of the body a purchaser. Much has been said, and much has been insinuated at the bar to discredit that case. But I hold it to have been determined upon sound legal principles. For the misapprehension of a testator, in thinking the remainders were contingent when they were not so, cannot alter the rule of law. But were it otherwise, had the case of *Coulson* v. *Coulson* been decided upon dubious grounds, I should tremble at the consequence of shaking its authority, after it has now been established for thirty years, and half the titles in the kingdom are by this time built upon its doctrine. But there is no occasion, upon the present question, to disturb the case of *Coulson* v. *Coulson,* by either affirming or denying it. For, in the devise to Isaac Gale and his heirs, there is no such purpose avowed as the preserving contingent remainders: it is only to be conjectured and guessed at. The purpose of the testator might be (as in the case of *Duncomb* v. *Duncomb*), to prevent dower in the wife of his son, or tenancy by the curtesy in his daughters' husbands:—especially as he had, by another clause in his will, destroyed the joint-tenancy of his daughters, which would otherwise (according to 2 Roll. Abr. 90), have prevented the curtesy of their husbands. And where it is possible there may be more intents than one, the selecting of the true intent is at best but probability and guess-work; and does not amount to that declaration plain, which Lord Hobart and Lord Hardwicke require, before it shall set aside a positive rule of law.

If this be so, we are driven back to the introductory words as the only evidence of this intent: and then the result of the whole matter is, that the testator, having declared his intent, that his son shall not alien his land, he to that extent gives his son an estate to which the law has annexed the power of alienation: an estate to himself for life, with remainder to the heirs of his body. Now, what is a court of justice to conclude from hence? Not, that a tenant in tail, thus circumstanced, shall be barred of the power of alienation; this is contrary to fundamental principles. Not, that the devisee shall take a different estate from what the legal signification of the words imports; this, without other explanatory words, is contrary to all rules of construction. But, plainly and simply this: that the testator has mistaken the law, and imagined that a tenant for life, with first an interposed estate, and then a

remainder to the heirs of his body, could not sell or dispose of this interest.

My Lord Chief Baron on the argument put a question to the counsel for the defendant, to which no satisfactory answer was or could be given. Suppose, after the like declaration of his intent, the testator had devised the premises to his son and his heirs for ever: Would that have made the son tenant for life only, and his heirs take as purchasers? Most clearly not. This case is the same in kind, and differs only in species. The words now used are as apt legal words to create an estate tail, as those an estate in fee. And as I conceive, that when a testator has devised a vested estate, his creation of a trust to preserve contingent remainders will not turn it into a casual executory interest; so also I think, that when he has (though ignorantly) devised an estate that is alienable, no previous or concomitant intent to prevent his devisee from alienating shall alter the nature of that devise.

Will it be said, that when the testator's intent is manifest, the law will supply the proper means to carry it into execution, though he may have used improper ones? This would be turning every devise into an executory trust, and would be arming every court of law with more than the jurisdiction of a court of equity; a power to frame a conveyance for the testator, instead of construing that which he has already framed.

Will it then be said, that because the means marked out by the testator will not answer the end proposed, therefore he intended to use other means and not those which he has marked out? This consequence, I apprehend, will not follow by any rules of law or logic. For then it must be supposed, that every man, who has so in view a particular end, knows also and is sure to employ the most effectual means to carry it into execution; which is paying too great a compliment to human wisdom. Let us see how this argument will stand in form. The testator intended to use those which were the most effectual means to prevent his son from selling his estate; that the son's heir should take by purchase was the most effectual means: therefore the testator intended that the heir should take by purchase. Here the first proposition will not be granted, that he intended to use those which were the most effectual means; for this intent implies his knowledge of what were the most effectual, of which there is no shadow of evidence. Or, put it otherwise; the testator intended to use what he thought the most effectual means: but he thought the heir's taking by purchase was the most effectual; therefore he intended that the heir should take by purchase. Here the second proposition can never be proved; that the testator thought any such thing. The true consequence I conceive to be this: that because the means marked out by the testator are not adequate to the end proposed, therefore he was mistaken in their efficacy.

If a man proposes to qualify a son to sit in the House of Commons, and to that intent devises to him an annuity of £300 per annum for 99 years, if he so long lives; we cannot argue from this declared intent of the testator, that this term of years shall be construed to be a free-

hold estate for life, because otherwise it would not answer the intent. We should rather conclude, that the testator was ignorant of the distinction between the two estates, and had unfortunately chosen that which was unfit for his purpose.

The case of *Popham* v. *Bamfield* (as the two parts of it are reported in 1 Vern. 79, 1 Wms. 54), was in this respect stronger than the present. One Rogers had devised a large estate to the testator's (Popham's) son, on condition that his father would also settle two-thirds of his estate on the son and his heirs male. Now, though the testator was under a strong obligation, by this condition, to give an estate to his son and his heirs male; though he recited in his codicil that he had devised the lands to his son and heirs male of his body; which were indisputable evidences of his intention to give his son an estate in tail male; yet, having in his will by express words made his son only tenant for life, with remainder to his first and other sons, in tail, the lord keeper, assisted by the two chief justices, the master of the rolls, and Mr. Justice Powell, all agreed that the estate must remain in strict settlement. And, if an intention of the testator (so manifestly and directly proved) was not in that case sufficient to make the words "first and other sons" be construed "heirs male of the body," much less in the present instance shall it turn the words "heirs of the body" into "first and other sons."

Upon the whole, I conclude, that though it does appear, that the testator intended to restrain his son from disposing of his estate for any longer term than his life, and to that intent contrived the present devise; yet, it does not appear by any evidence at all, much less by declaration plain, that in order to effectuate this purpose he meant that the heirs of the body of his son should take by purchase and not by descent, or even that he knew the difference.

The consequence is, that by the legal operation of the words, which are not in my opinon controlled by any manifest intent to the contrary, the heir could only take by descent, and of course John Williams, the son, was tenant in tail of the premises, and duly authorized to suffer the recovery, that has been pleaded; and therefore I am of opinion that the judgment below should be

Reversed.

Statute of N. Y., Mich., &c. "When a remainder shall be limited to the heir or heirs of the body of a person to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heirs, or heirs of the body, of such tenant for life, shall be entitled to take as purchasers, by virtue of the remainder so limited to them." C. L. (1897) § 8810; **Minn.** St. (1866), c. 45, § 28, R. L. (1905), § 3217; **N. Y.** R. S. (1828), pt. 2, c. 1, t. 2, Art. 1, § 28; **Mich.** R. S. (1846), c. 62, § 28; **Wis.** R. S. (1849), c. 56, § 28, St. (1898), § 2052.

Rule in Wild's Case.

ANON., in Common Bench, Hilary, 6 Eliz.—A. D. 1564—1 And. 43, pl. 110.

One devised his land to William his son for term of life, and after his decease to the men-children of his body, and if the said William die

without any man-child of his body then the land should remain over, &c. The testator died, William died without any issue male of his body; and on this the question was what estate he had. The justices held that he had an estate to him and the heirs male of his body.

WILD'S CASE, in B. R., Hilary, 41 Eliz.—A. D. 1599—6 Coke 16b, Moor 397, Golsb. 139, 1 Vent. 225, 2 Lev. 58. From Coke.

Ejectione Firmae between Richardson and Yardly, and on not guilty pleaded the jury gave a special verdict to this effect. Land was devised to A for life, remainder to B and the heirs of his body, the remainder to *Rowland Wild and his wife, and after their decease to their children,* Rowland and his wife then having issue a son and daughter; and afterwards the devisor died, and after his decease, A died, B died without issue, Rowland and his wife died, and the son had issue a daughter and died. If this daughter should have the land or not was the question: and it consisted only upon the construction what estate Rowland Wild and his wife had, viz. if they had an estate tail, or an estate for life with remainder to their children for life. The case for difficulty was argued before all the judges of England, and it was resolved, that Rowland and his wife had but an estate for life, with remainder to their children for life, and no estate tail.

In the construction of the will the judges first considered the judgment of the common law, if the conveyance had been made by the devisor in his life, and second the reason and cause that the judgment shall not be according to the rule of law. And it was resolved without question, that at the common law they had but an estate for life, the remainder to their children for life. Then what shall be the reason and cause to give them an estate tail by construction in this case? It will be answered, the intent of the testator. But it was resolved, that such intent ought to be manifest and certain, and not obscure and doubtful; for at the common law lands were not devisable, but only by custom, and that in ancient cities and boroughs, of houses and small things, * * * for the ancient common law did favor him whom the common law made heir, because he was to sit in the seat of his ancestor, and to serve the king and commonwealth. * * * And therefore this difference was resolved for good law, that if A devises his lands to B and to his children or issue, and he hath not any issue at the time of the devise, that the same is an estate tail; for the intent of the devisor is manifest and certain that his children or issue should take, and as immediate devisees they cannot take, because they are not *in rerum natura,* and by way of remainder they cannot take, for that was not his intent, for the gift is immediate. Therefore there such words shall be taken as words of limitation, *scil,* as much as children or issues of his body; for every child or issue ought to be of the body, and therewith agrees a case in Trinity 4 Eliz. [above?] where one devised land to husband and wife and to the men-children of their bodies begotten, and it did not

appear in the case that they had any issue male at the time of the devise, and therefore it was adjudged that they had an estate tail to them and their heirs male of their bodies.

But if a man devises land to A and his children or issue, and they then have issue of their bodies, there his express intent may take effect, according to the rule of the common law, and no manifest and certain intent appears in the will to the contrary. And therefore in such case, they shall have but a joint estate for life.

But it was resolved that if a man as in the case at bar, devises land to husband and wife, and after their decease to their children, or the remainder to their children; in such case, although they have not any child at the time, yet every child which they shall ever have after, may take by way of remainder, according to the rule of law; for his intent appears that their children should not take immediately, but after the decease of Rowland and his wife.

The rules declared in this case are generally known in the law as the Rule in Wild's Case. This doctrine is now applicable to both deeds and wills, by virtue of statutes found in many states declaring that the word heirs shall not be necessary to pass a fee by deed, or that every grantor shall be presumed to intend to pass all the estate he has unless a different intention is expressed in the deed.

The statutes enacted in all of the states, declaring that the devisee shall take as large an estate as the testator could give at the time of his death unless a different intent appears, result in a modification of the rules in this case to the extent that the children will take in fee if they take as purchasers.

OATES v. JACKSON, in King's Bench, Mich. 16 Geo. II.—A. D. 1743—2 Strange 1172.

Upon a case made at the assises, it was stated, that *Ralph Clay* being seised in fee of an estate called *Wolf's Park,* devised it in these words, "As to *Wolf Park* I give it to my wife *Annabella* for her life, and after her death to my daughter *Isabella Addibell* and her children on her body begotten or to be begotten by *William Addibell* her husband, and their heirs for ever." That the wife is dead, and *Isabella* at the time of making the will had one daughter *Elizabeth,* and afterwards two sons and one daughter, who are all dead without issue: that *Elizabeth* had issue the lessor of the plaintiff: that *Isabella* survived *William Addibell* and married *Jackson,* by whom she had a son the present defendant, who entered on her death.

The question was, what estate passed to *Isabella* and her children by *William Addibell*: the plaintiff insisting, that *Isabella* was only tenant for life, and the children of that marriage had the reversion in fee: the defendant insisting, that *Isabella* was jointly seised in fee with the children, and having survived them all, and left him her son and heir, he is entitled.

And after several arguments the Chief Justice delivered the resolution of the court: that *Isabella* took as joint-tenant. It being stated, that

at the time of making the will she had *a child,* which has been construed to be equal to *children: 2 Vern.* 106. *Coke Lit.* 9. is express, that to *A. et liberies suis* and their heirs, is a joint fee to all. And it is no objection, that by this means the several estates may commence at different times. *Coke Lit.* 188; *Pollexfen* 373; *Moore* 220.

As *Isabella* therefore survived all the children she had by *William Addibell,* the whole fee vested in her, and descended to her son the defendant. Who had judgment accordingly.

BUFFAR v. BRADFORD, in English High Court of Chancery, Nov. 27, 1741—2 Atkyns 220.

Bill to have personal estate secured and the deeds and writings, involved in a will providing among other things: "I give the use of the whole to my sister Mary Bradford, for her support and maintenance during the time she shall remain a widow, sans waste, so as the same be divided on her marriage; two eights to herself, two other parts to her daughter my niece Ann, and the remaining four parts to my niece Buffar, and the children born of her body."

LORD CHANCELLOR HARDWICKE: The question is what estate the testator's niece Buffar and her children take. She had no child at the time the will was made, but the plaintiff was born afterwards in the life-time of the testator; the mother of the plaintiff died in the testator's life-time. It is insisted on the part of the defendant Mary Bradford, who had the estate for life, and who is likewise the heir at law, that it is a lasped devise, for that the plaintiff's mother took an estate-tail, and *her children* are words of limitation and not of purchase where the devisee had none at the time the devise was made; and therefore, as the plaintiff's mother died before the testator, no estate vested in her, and consequently it is a lapsed legacy; and for an authority her counsel relied on *Wild's Case,* 6 Coke 17 [*ante* —]. On the other hand it must be admitted that *children* in its natural import is a word of purchase and not of limitation, unless it is to comply with the intention of a testator, where the words cannot take effect in any other way. But suppose that a devise was to A and after his death to his children, here it is a word of purchase.

It has been admitted very candidly by the counsel that as to the personal estate the children, though born after the making of the will, must take equally with the mother as joint-tenants; for where a man gives personal estate to A and his children, to construe the word *children* to be a word of limitation and not of purchase would be a strained and remote construction, and would defeat the children entirely, and the first taker would have all. Vide *Cook* v. *Cook,* 2 Vern. 545; and *Forth* v. *Chapman,* adjudged on the same words in Lord Macclesfield's time, 2 P. Wms. 663.

It is the time of possession in the present case which takes it out of

the reasoning in *Wild's Case;* for here Mrs. Buffar and her children are to have four eights, and to take at the same time as joint-tenants. The will in this case confines it to such children as should be born in the life-time of the testator, and therefore is not liable to the objection made by the defendant's counsel, that the remainder must divide and split as in common marriage settlements where there is an estate tail to daughters and one is born in the life-time of the father and another after his death. See *Stevens* v. *Stevens,* Cas. Temp. Talb. 228.

The plaintiff being born in the life time of the testator, would have taken with his mother as a joint-tenant if she had lived; and as she is dead, he shall take the whole by way of remainder. * * *

COURSEY v. DAVIS, in Pa. Sup. Ct., 1863—46 Pa. St. 25, 84 Am. Dec. 519.

Scire Facias to revive a judgment recovered by Wm. Davis and Mildred Ann Davis for damages, $512.10 for breach by defendants of their contract to buy from plaintiffs the land mentioned in the opinion. The defense was that plaintiffs' title was not a fee. Judgment below was for the plaintiffs. Writ of error by defendants.

READ, J. The rule in *Wild's Case,* 6 Coke, 16 b, by which where lands are devised to a person and his children, and he has no child at the time of the devise, the parent takes an estate-tail, has no application to the present case, in which there was a child or children of the mother living, at the time of the execution of the deed. The word "children" is not therefore a word of limitation, but of purchase, and the question is, What is the estate taken by the mother and children respectively?

The deed was executed on the 23rd of October, 1843, and was a conveyance by Peter Mowen and wife to Mildred Ann Davis, a married woman, by whom the consideration of eight hundred dollars is said to have been paid. In the premises it is stated to be "unto the said Mildred Ann Davis and her children exclusively, and their heirs and assigns," and the *habendum,* although not strictly formal, is "unto the said Mildred Ann Davis and her children exclusively, and their heirs and assigns forever, to them and their only proper use, benefit, and behoof, and to and for no other use, intent, meaning, or purpose whatsoever." The warranty is special, and is "to and with the said Mildred Ann Davis and her children, and their heirs and assigns.

At the execution of the deed, Mrs. Davis had an illegitimate child born before her marriage, and a legitimate child by her present husband, William Davis, by whom she has since had four children who are now living. The illegitimate child has released to its mother, and the child living at the execution of the conveyance is dead.

In construing this deed, it is necessary to collate the authorities, both in England and in this state, in order to ascertain the legal as well as the natural meaning of the words used to describe the estate of the mother and of the children. In *Jeffrey* v. *Honywood,* 4 Madd. 398, Vice-

Chancellor Leach held that a devise to the testator's daughter, a married woman, and to all and every the child and children, whether male or female, of her body lawfully begotten, and unto his, her, and their heirs or assigns forever, as tenants in common, and not as joint tenants, gave a life estate to the mother and a remainder in fee to the children. The mother died in the lifetime of the testator, leaving ten children, and it is probable that some of the children were living at the date of the will, although it is not so expressly stated.

In *Broadhurst* v. *Morris,* 2 Barn. & Adol. 1, a case stated by the master of the rolls for the opinion of the court of king's bench, the devise, which was of land, was in these words: "My will likewise is, that at the decease of my son-in-law, John Broadhurst, the same, the whole legacy to him, shall go to my grandson William Broadhurst, and to his children lawfully begotten, forever, but in default of such issue, at his decease, to my grandson Alexander Bridoak, natural son of my daughter, Rebecca Bridoak, him, his heirs and assigns forever." Until the testator's death, William Broadhurst had not been, nor was married. The court, Lord Tenterden and Justices Parke and Taunton, certified that William Broadhurst took an estate-tail, but assigned no reasons for their opinion. Mr. Jarman says (2 Jarman on Wills, 371): "The case of *Jeffrey* v. *Honywood,* 4 Madd. 398, seems to be inconsistent with, and must therefore be considered as overruled by, the case of *Broadhurst* v. *Morris,* 2 Barn. & Adol. 1." And in *Webb* v. *Byng,* 2 Kay & J. 673, Wood, V. C., said: "The contention was, that the devise was to the mother for life, with remainder to her children, as joint tenants in fee. The only authority for such a construction is the case of *Jeffrey* v. *Honywood,* 4 Madd. 398, and even that has been overruled by *Broadhurst* v. *Morris,* 2 Barn. & Adol. 1. Independently, however, of that consideration, what I chiefly rely upon is this: that the Quendon Hall estate,—the subject of this devise,—is the estate by means of which the testatrix intends by her will, to perpetuate the name of Cranmer; and if I were to hold that devise to have been a devise to Mary Ann Byng for life, with remainder to her children as joint tenants in fee, the estate would be divisible into eight separate estates, and as the parties who are to take the property are also to take the name and arms, the result would be to found as many small families, all bearing the name and arms of Cranmer, whereas the testatrix speaks of her estate as one and indivisible, and to be enjoyed in its entirety. In rejecting such a construction in favor of one which will treat the word 'children' as a word of limitation, and not of purchase, I do not depart from the spirit of the rule in *Wild's Case,* 6 Coke, 16 b,—the real rule in that case being that it is lawful, as Lord Hardwicke puts it, to construe the word 'children' as a word of limitation when the will necessitates such a construction. This is a case of that description, and as the only means of keeping the property which the testatrix has described as her Quendon Hall estates in one mass, which is clearly the general intention of the will. I am compelled to hold that in this will the word 'children' is a word of limitation, and that the devise created is an estate-tail." In

addition to the name and arms, there were various chattels, as a striking-watch and her diamond ear-rings, and pins devised as heir-looms with her estate, and the vice-chancellor commences his opinion with this sentence: "However bold the decision may appear, I must hold this devise of the Quendon Hall estates to be estate-tail."

Upon appeal, the lords justices (26 L. J., N. S., 107), considered the construction of the devise to be one of great difficulty Lord Justice Knight Bruce said: "The inclination of his opinion was, that notwithstanding the fact of Mrs. Byng having to the knowledge of the testatrix, when she made her will, several children, that lady was made by the devise, tenant in tail of the Quendon Hall estate. The vice-chancellor had adopted that view, and his lordship could not give his voice for varying that decision, as he was not pursuaded that the effect of the devise was to make Mrs. Byng tenant for life, or joint tenant with her children." Lord Justice Turner said: "As to the other point, the devise of the Quendon Hall estate, he had rarely seen a will more difficult to interpret. Two things are, however, clear: that Mrs. Byng was the principal object of the bounty of the testatrix, and that she intended the Quendon Hall estate to be a family estate, with which the name of Cranmer was to be perpetuated. The first appeared from the whole will, and the other from the gift of the heirlooms, and the name and arms clause. Both these circumstances led to the conclusion that the children were to take through Mrs. Byng, not with her or after her." No observations, according to this report, were made by the lord justices upon either of the cases of *Jeffrey* v. *Honywood,* 4 Madd. 398, or *Broadhurst* v. *Morris,* 2 Barn. & Adol. 1. Upon appeal to the House of Lords, the decision of the lords justices was affirmed, and is reported under the name of *Byng* v. *Byng,* 31 L. J. Ch. 470. Lord Chancellor Westbury placed his opinion upon the peculiar terms of the will, and the evident intention of the testatrix, whilst lords Cranworth and Kingsdown, taking similar grounds, certainly expressed opinions hostile to the construction of the words we have been considering as giving a life estate to the mother with remainder to the children, and in favor of a joint tenancy, between the mother and children, without saying whether after-born children were to be included or not.

It is clear that *Webb* v. *Byng,* 2 Kay & J. 673, was decided upon the intention of the testatrix, which required the devise to be held to create an estate-tail, and it in no manner conflicts with the case of *Jeffrey* v. *Honywood,* 4 Madd. 398; nor does *Broadhurst* v. *Morris,* 2 Barn. & Adol. 1, which was a case where the father was not married until after the death of the testator. In arguing this case, Cowling said: "If the devise stopped at the words 'lawfully begotten forever,' the case would be governed by the rule in *Wild's Case,* 6 Coke, 16 b, viz., that where lands are devised to a person and his children, and he has no child at the time of the devise, the parent takes an estate-tail;" and so little was it supposed to interfere with *Jeffrey* v. *Honywood, supra,* that it was neither cited nor referred to by either Mr. Cowling or Mr. Preston, both gentlemen of great learning and research. In *Bowen* v. *Scowcroft,* 2 Younge & C. 640, Mr.

Campbell, in argument (p. 656), said: "There is a total distinction between this and *Wild's Case,* 6 Coke, 16 b. In that case the devise was to A and his children; in the present, the words are, 'to the children and their heirs'. This distinction was taken in *Ives* v. *Legge* [cited in 1 Fearne on Remedies, 377]; and the principle was acted upon in *Jeffrey* v. *Honywood,* 4 Madd. 398." Baron Alderson (p. 661) adopted this construction, and said: "Lastly, as to Lucy Bowen's share. It was contended as to this that she took an estate-tail, having no children at the time of the testator's death. But I think this is not so, and that it is distinguishable from *Wild's Case,* 6 Coke, 16 b, on the same grounds as were taken by Sir John Leach, in *Jeffrey* v. *Honywood,* 4 Madd. 398. Indeed, on this point of the case, *Jeffrey* v. *Honywood* seems precisely in point."

After some doubt and hesitation, it has been determined in England that *Wild's Case,* 6 Co. 16 b, does not apply to personalty. In *Audsley* v. *Horn,* 28 L. J., N. S. c. 293, the master of the rolls decided that a bequest of leasehold premises to A and her children (after a prior life estate), gave a life estate to A, with remainder to her children, although she had no children at the death of the testator, or of the tenant for life, and this decision, upon appeal, was affirmed by the lord-chancellor: 29 L. J., N. S. c. 201.

In *Haskins* v. *Tate,* 25 Pa. St. 249, this court held, the present chief justice delivering the opinion, that a devise by a testator in these words: "I further will that the plantation I bought of my son Robert, lying near Hill's mill, shall be equally divided amongst my son Robert's children, he and them enjoying the benefits of it whilst he lives," gave Robert a life estate, with remainder to all the children born before or after the death of the testator. The court did not determine whether Robert took a life estate in the whole or not, but they decided that the period of division was the death of Robert, and that the limitation to his children was to a class,—the time of distribution defining the members that were to constitute the class. In *Gernet* v. *Lynn,* 31 Pa. St. 94, where a testator devised land to his son J., to hold the same to him during his natural life, and after his decease to his children lawfully begotten, share and share alike, it was held that J. took an estate for life with a vested remainder in fee to his children in being at the death of the testator, which opened to let in after-born children. At the date of the will, the son had four children, and afterwards, four other children, some of whom were born after the death of the testator. The children, therefore, took as a class. In *Brink* v. *Michael,* 31 Id. 165, my brother, Woodward, for sufficient reasons on the face of the case, confined the word "children" to the then living children of William Brink by his first wife, he being a widower living on the farm conveyed by the deed, with his children. He said: "The natural love and affection which constituted the consideration of the deed, and maintenance, and education, which were among the objects it aimed to promote, had reference, and in the nature of things must have had exclusive reference, to the children then in being; they

were before the grandfather's eyes, and were more manifestly the objects of his bounty."

In *White* v. *Williamson,* 2 Grant Cas. 249, there was a declaration of trust for the use of Mary M. Weaver and her children, and a subsequent declaration of trust by Benjamin F. Weaver, to whom the premises had been afterwards conveyed, that he held the same in trust for Mary M. Weaver and her children, and their heirs. The question, as stated by my brother Strong, was, What interest did Mrs. Weaver take under the original declaration of trust? "Was it a life estate with remainder to her children, or was it a tenancy in common with them?"

The court adopted the first view, and held that the gift to the children was as a class, and not individually. This is the natural construction, and is now the established rule as to personal property; and we have seen that such has been the view taken as to real estate in two leading cases in England which have never been distinctly overruled. In this state, the only case cited for a contrary doctrine is *Shirlock* v. *Shirlock,* 5 Pa. St. 367, where the mother and all her children were living at the date of the conveyance. The court below held that they were tenants in common, and the mother taking one eleventh, her husband, the defendant below, on her death, became tenant by the curtesy of her share. The defendant, the husband, took a writ of error, on the ground that his wife's estate was a tenancy in tail of the premises conveyed. In a *per curiam* opinion, the court say: "There is no error in the record of which the defendant below can avail himself;" and here the case really terminated, for if not an estate-tail, which it clearly was not, then the decision below was the most favorable for him; for if his wife's interest was only a life estate, then he had no claim whatever to any part of the premises. The rest of the opinion is extrajudicial, but sustains the view taken by the court below. The subsequent cases, however, have sustained what appears to be the true construction, and with the light afforded by them, we proceed to examine the case before us.

The words used are, "unto the said Mildred Ann Davis, and her children exclusively, and their heirs and assigns." By giving the mother a life estate, and regarding her children as a class, we provide not only for those in existence at the date of the conveyance, but for those, also, a married woman might reasonably expect to have, and the period of distribution would be the termination of the life estate by her death. This would give effect to the word "exclusively," for upon the construction adopted by the court below, her husband would have a curtesy estate, if he survived his wife, in the whole or a part of the premises. Any other construction would cut off the subsequently born children, which we do not feel disposed to do, unless compelled by a settled rule of law, which we do not find to be the case. Adopting, therefore, this benign construction of this conveyance, the judgment is reversed, and judgment entered for the defendant for costs upon the case stated.

A life estate to the grantee first named and remainder to his children born and to be born was held to be created by a deed in these words: "This

March 21 day 1885: This indenture made and entered into between Eli Hall and Polly Hall of the first part and Joseph Hall and his children of the second part. * * * Know all men that I Eli Hall and Polly Hall of the first part hath this day bargained and sold unto Joseph Hall of the second part a certain tract * * * We the party of the first part doth bargain sell and convey the above named tract of land and will warrant and defend the title of the same from us and our heirs and assigns and from all other unto the said Joseph Hall and his children forever," &c. Hall v. Wright (1905), 121 Ky. 16, 27 Ky. L. R. 1185, 87 S. W. 1129, reviewing the Kentucky decisions.

A devise of land in trust for testator's daughter "and all her children if she shall have any" was held to give the daughter a fee, she having no children at testator's death. Silliman v. Whitaker (1896), 119 N. C. 89, 25 S. W. 742, reviewing several decisions.

The stepmother and her children were held to take jointly under a devise of the residue "to my first husband's stepmother and her children," Gordon v. Jackson (1899), 58 N. J. Eq. 166, 43 Atl. 98.

"I leave to my dear wife and our sweet little children all that I possess," made them joint-tenants. Fitzpatrick v. Fitzpatrick (1902), 100 Va. 552, 42 S. E. 306.

It was held that the daughter took a life estate with remainder in fee to the children in the following devise to her "in trust for her sole use and benefit, and of her children and their children thereafter. But in the event that my daughter should die and leave no children as heirs to the within mentioned property, then it is my will and desire that all of said property shall go to my brother." Schaefer v. Schaefer (1892), 141 Ill. 337, 31 N. E. 136.

The statute having abolished estates-tail, a fee simple was given by a devise "to said W. and his heirs being his own children." Moore v. Gary (1897), 149 Ind. 51, 48 N. E. 630.

CHAPTER III.

ESTATES OF FREEHOLD NOT OF INHERITANCE.

For Several Lives.

ANONYMOUS, in Common Pleas, Trinity Term, 3 Edw. 6.—A. D. 1550.—Moor 8.

Land was leased to I. S., *habendum* to him for life and for the lives Jane his wife and William his son. HALES, J. It seems that he shall have an estate for his own life, and that the limitation for the lives of the others is void, and that there was no right to the occupant in the case. BROWN, J., agreed that there was no right of occupant, but he held that this inured by way of remainder, the one after the other. MONTAGUE, C. J., held that they should have an estate for the lives of all, and that the occupant had right.

UTTY DALE'S CASE, in Common Pleas, 32 Eliz.—A. D. 1591, Cro. Eliz. 182.

A lease was made to J. S. "to have and to hold to him and his assigns for his own life, and for the life of A and B." J. S. died. Is his estate determined, because one cannot have a greater estate of freehold than his own life?

ANDERSON, C. J., and the court held clearly that it is a good limitation, and he has an estate for all their three lives; for although he himself cannot have an estate but for his own life, yet he may have it to grant to another, and the *habendum* for their three lives is a good limitation, and by his death the estate is not determined, but *occupanti conceditur*.

HILLS v. HILLS, Moor 876. Jac. I.—A. D. 1605-15?

A man made a lease for years rendering rent during his life and the life of his wife. This is during the life of the longest liver of them. So adjudged.

ROSSE'S CASE, in King's Bench, Mich., 41 & 42 Eliz.—A. D. 1600—5 Coke 13, Moor 398, 399, Gold. 157, Cro. Eliz. 491.

Ejectione firmae between Peter Rosse and Aldwick. A lease is made to A and his assigns, *habendum* to him during his own life and the lives of B and C. If this limitation during the lives of B and C was

void or not was the question. It was adjudged that the limitation was good. It was objected that when a man has two estates in him, the greater shall drown the less, and that an estate for his own life is higher than for the life of another; and therefore an estate for his own life and for lives of others cannot stand together. It was answered and resolved, that in the case at bar the lessee had but one estate, which has limitation during his own life and the lives of two others, and he had but one freehold; and therefore there cannot be any drowning of estates in the case, but he had an estate of freehold to continue during these three lives and the survivor of them.

Waste by Life Tenant.

ANON, in the Common Pleas.—A. D. 1303, Mich., 31 Edw. I, Horwood's Year Books 480.

In a writ of waste of a mill, if the defendant say that the post and other timbers were carried away by an inundation, and can aver it, he shall not answer for the waste. *per* BEREFORD.

ROLT v. LORD SOMMERVILLE, in English High Court of Chancery, Trinity Term.—A. D. 1737—2 Eq. Cas. Abr. 759.

A very considerable real estate was limited to Mrs. Rolt (who afterwards married the defendant the Lord Somerville) for life, *without impeachment for waste,* remainder to the plaintiff Rolt for life, without impeachment for waste, with several remainders over. The defendant the Lord Somerville, to make the most of this estate during the life of his wife, pulled down several houses and out-buildings upon the estate, and sold the same, and took up lead water pipes that were laid for the conveyance of water to the capital messuage and disposed thereof; and he also cut down several groves of trees that were planted for the shelter and ornament of the capital messuage. Upon this a bill was brought by the plaintiff to compel the defendant to account for the money raised by the particulars before mentioned, and to put the estate in the same plight and condition that it was before. To this the defendant demurred, and thereby insisted that this waste was committed by tenant for life without impeachment for waste, and therefore he was not liable to be called to account for what he had done, either in law or in equity; and if he was, yet the plaintiff could not call him to account, because he was not a remainder man of the inheritance.

LORD CHANCELLOR HARDWICKE:—Though an action of waste will not lie at law for what is done to houses or plantations for ornament or convenience by tenant for life without impeachment for waste, yet this court hath set up a superior equity, and will restrain the doing such things on the estate. In *Lord Barnard's Case* the court restrained him and ordered the estate to be put in the same condition. In *Sir Blundel Charleton's*

Case the master of the rolls decreed that no trees should be cut down that were for the ornament of the park; but Lord Chancellor King reversed that, and extended it only to trees that had been planted in rows. My only doubt is as to the trees that have been cut down, for if this bill had been brought before such trees had been cut down as were for the ornament and shelter of the estate, this court would have interposed. But here the mischief is done, and it is impossible to restore it to the same condition as to the plantations, and therefore it can lie in satisfaction only; and I cannot say the plaintiff is entitled to a satisfaction for the timber which is a damage to the inheritance; yet as to the pulling down of the houses and buildings and laying the lead pipes, they may be restored, or put in as good condition again. In the case of my Lord Bernard there were directions for an issue at law to charge his assets with the value of the damages, he not having performed the decree in his life-time.

The demurrer was allowed as to satisfaction on account of the timber, but overruled as to the rest.

CLEMENCE v. STEERE, R. I. Sup. Ct., 1850.—1 R. I. 272, 53 Am. Dec. 621.

ACTION of waste. The defendant was devisee of a life estate in the premises under the will of W. C. Steere. The plaintiff, who was also executor of the will, claimed under a conveyance from a devisee of the reversion. The facts sufficiently appear from the charge of the court.

By Court, GREENE, C. J. This is an unusual form of action in our courts; but it is an action well known to the law, and established in our state by statute nearly two centuries ago. And it is a wise provision; for unless there were some such remedy provided, the owner of the reversion, having no right to enter upon the premises, would be left at the mercy of the tenant for life. Although very stringent, causing a forfeiture of the estate wasted, it was designed to promote good husbandry, and should be fairly and reasonably enforced. You are, therefore, to entertain no prejudices on account of the nature of the suit, nor on account of the relations of the parties. They should stand before you divested of everything calculated to move either sympathy or prejudice.

The question for you is, Has waste been committed in any or all the ways in which it has been charged? I will go over the charges separately.

The defendant is charged with having converted meadow land into pasture land. In England this would be waste. But we are not to apply the English law too strictly. Our lands are, in many respects, cultivated differently from land in England; and this difference is to be taken into account. Here it is necessary to show that the change is detrimental to the inheritance, and contrary to the ordinary course of good husbandry. If in this case the change injured the farm, or was such a change as no good farmer would make, it was waste: Greenl. Cruise,

tit. 3, c. 11, sec. 18; 3 Dane's Abr., c. 78, art. 5; *Harrow School* v. *Alderton*, 2 Bos. & Pul. 86.

It is said that the pastures have been permitted to become overgrown with brush. In England that would be waste, but you would not expect so high a state of cultivation in Burrillville as in England, or as in the vicinity of a populous city. There must be such neglect in cutting the brush as a man of ordinary prudence would not permit; and if there was in this case such neglect, it is waste.

Another item is the cutting and selling off the farm fifteen cords of wood. The tenant for life has a right to cut only so much wood as is necessary for fuel and repairs. Therefore to cut wood and sell it off the farm is waste, beyond a doubt. The defense set up is that the plaintiff assented to it. If he has assented, either before or after the cutting, he has no right to claim a forfeiture of the estate on that account. You will consider in connection with this point the relations sustained by the parties. This estate was charged with the comfortable support of the defendant. As owner of the reversion, the plaintiff is bound to provide for her; and as executor, the will obliges him to sell the estate for her maintenance if necessary. Now if the sale of the wood went for the support and so relieved the estate of the charge for her support, this is a fact for you to consider in connection with other facts bearing upon the question of his assent.

Another charge is cutting hoop-poles. Hoop-poles are timber trees in the earlier stages of their growth. This would be waste, unless it is the ordinary mode of managing the farm. It may be as usual for tenants to cut hoop-poles, when of the proper size, as to harvest the potatoes or fruit; and it would be wrong to make that waste which would not be waste in an ordinary tenant for a term of years: Greenl. Cruise, tit. 3, c. 11, sec. 5, and note; 4 Kent's Com. 76, 77.

Then there is a charge not only for not repairing the house, but also for tearing it down. Now, in regard to the question of repairs, if the life tenant receives a house in such a state as not to be reparable, or so dilapidated that the expense of repairing would be beyond the value of the house, he is not bound to repair, and may leave it to its natural destruction. But if the house is such that repairs would make it tenantable, he is bound to make them. But in regard to the charge of tearing the house down, the fact that it was not tenantable is no excuse. Whatever may have been its value the reversioner had a right to it. If he consented to the demolition, that indeed alters the case; and you are to look to all the circumstances of the transaction and the parties for the evidence of the consent. If the house was torn down after she left the premises, and neither by her direction nor permission, she is responsible: Greenl. Cruise, tit. 3, c. 11, secs. 21, 30; 4 Kent's Com. 77; *Fay* v. *Brewer*, 3 Pick. 203.

She is charged with removing the crib. The defense is that it did not belong to the inheritance, that it was placed by the life tenant upon a rock and not affixed to the freehold. If this was the case, it

is not waste. She is charged with tearing down the barn. This is an important part of the farm. The defense set up is that it was so old and unstable that she feared it would fall upon her cow. If there was any such danger she had a right to tear it down, unless its dilapidated condition resulted from her neglect to repair. There are also charges of tearing boards from the buildings and destroying the fences, which if proved amount to waste.

You will perceive that there are various portions claimed to be wasted. Waste in any particular place forfeits the place, as waste in the woods forfeits the woods, in the meadow forfeits the meadow. A destruction of the dwelling-house forfeits the whole place. You are to find the place forfeited where the waste was committed. And, in addition, you are also to assess the damages for the place wasted, over and above the value of the place.

Verdict for the plaintiff, in that there has been waste of hoop-poles in the pasture, with damages in the sum of twenty-five dollars.

CALVERT v. RICE, in Ky. Sup. Ct., May 12, 1891.—91 Ky. 533, 16 S. W. 351, 34 Am. St. Rep. 240.

PRYOR, J. This is a controversy between the appellants who are the life tenants, and the appellees, who own the inheritance, and are entitled to the possession when the tenancy expires. It is a petition in equity, with an injunction to stay waste. W. H. Duvall owned at his death a tract of three hundred and twenty-five acres of land lying on the Maysville and Mt. Sterling Turnpike, in the county of Mason. At his death seventy-five acres of this tract including the dwelling, was allotted to his widow as her dower. She subsequently married the appellant, Jesse Calvert, who has been cutting the timber on the dower land, and converting it into rails for the use of the dower tract. The first husband, Duvall, left one child surviving him, who married the appellee, Rice, and they instituted this action, asking that the appellants be enjoined from cutting any trees on the dower and from committing waste.

The testimony is conflicting as to the number of trees cut and used on the premises by the appellants in repairing the buildings and the fencing. The appellant admits the cutting about fifteen trees, and the appellees say that he cut at least twenty. The main contention arises from the scarcity of timber on the entire farm, it appearing that all the timber is on the dower tract, and covers only about ten or twelve acres of the dower land, and some of that timber is in the yard. It appears that only one tree was cut that was standing in the yeard, and that seems to have been decayed, and in such close proximity to the dwelling as subjected it to danger if the tree should fall.

If this case is to be determined upon the idea that there is not a sufficiency of timber on the dower to keep in repair the entire tract, then the injunction ought to go, for it is evident that there is not more

than a sufficiency of timber to keep up and continue in permanent repair the dower tract. The scarcity of timber, however, does not prevent its use by the life tenant in repairing the buildings and fencing on the premises. It only requires that he should be the more careful in its use, and only cut so much as would be used by a prudent man when in possession and the owner of the fee, and necessary to keep the premises in repair. It is the duty of the life tenant not to permit the premises to go to destruction for the want of repairs, and particularly when there is timber on the place from which the repairs may be made. It is better for those in remainder that the life tenant should keep the premises in repair, so that when the term expires the owner of the fee receives it in good condition, than to be compelled to receive it as a ruined and dilapidated farm. There is no doctrine better settled than that of the right of the tenant for life to take reasonable estovers from the estate, but not to such an extent as to work an injury to the inheritance; and what is meant by this injury is, that the tenant shall not make an unreasonable use of this right. The right to timber for firewood and repairing buildings is an incident to every life estate to be used for such purposes when on the land. The tenant has no right to cut and use rail timber for firewood when there is other timber that might be used for that purpose, or to even cut and use young and growing timber that would not make more than four or five rails to the cut for fencing purposes. This would be an unreasonable use of it. The proper use of the timber by the tenant, as is said in the text-books and reported cases, "is to give the tenant necessary fuel that he may remain on the premises, and sufficient timber to keep the fences and buildings in repair": 2 Bla. Com.; *Padelford* v. *Padelford,* 7 Pick. 152; *Miles* v. *Miles,* 32 N. H. 147; 64 Am. Dec. 362.

Why is it not to the advantage of the remainder-man that the premises should be kept in repair? It is not required or expected of the tenant that he shall expend his money in buying plank or lumber to improve fences and keep the premises in repair, so that the timber may pass from him to the inheritance untouched, although its judicious use may lessen the value of the estate. The owner of the fee would use this timber if without means to purchase other material, and so would any prudent farmer. He would not cut the timber in the yard left for ornamental purposes, nor could the tenant, without being guilty of waste; but ordinary woodland can be used in a prudent manner for the use of the premises, and that use or the right to use the timber not having been abused by the tenant, we see no reason for an injunction, the effect of which would be to enrich the inheritance at the expense of the life tenant.

The judgment is, therefore, reversed, with directions to dismiss the petition.

MARSHALL v. MELLON, in Pa. Sup. Ct., Jan. 4, 1897—179 Pa. St. 371, 36 Atl. 201, 57 Am. St. Rep. 601, 35 L. R. A. 816.

Assumpsit for rent due on an oil lease. Judgment for defendants. Plaintiff appealed.

GREEN, J. In *Stoughton's Appeal,* 88 Pa. St. 198, we said: "Oil, however, is a mineral, and, being a mineral, is part of the realty: *Funk* v. *Haldeman,* 53 Pa. St. 229. In this it is like coal or any other mineral product which *in situ* forms part of the land." In *Gill* v. *Weston,* 110 Pa. St. 312, we said of petroleum, "It is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may with propriety be called mining lands." In *Westmoreland Nat. Gas Co.* v. *De Witt,* 130 Pa. St. 235, we said: "Gas, it is true, is a mineral, but it is a mineral with peculiar attributes." In *Blakely* v. *Marshall,* 174 Pa. St. 425, a lease for oil and gas purposes was made by lessors who were tenants for life and also as trustee for those in remainder. The leased premises proved to be productive. A question arose upon a case stated as to the interests respectively of the life tenants and those in remainder. The life tenants claimed the whole of the oil, and for those in remainder the same claim was made. The court below appointed a trustee to receive all the oil due to the lessors, and to invest the proceeds, and pay the interest annually realized therefrom to the life tenants during their joint lives and the life of the survivor, and, at the death of the latter, to pay the principal to the remaindermen. This court sustained the court below and said: "As was said in *Stoughton's Appeal,* 88 Pa. St. 198, and other cases in the same line, oil in place is a mineral, and, being a mineral, is part of the realty. An oil lease investing the lessee with the right to remove all the oil in place in the premises, in consideration of his giving the lessors a certain per centum thereof, is, in legal effect, a sale of a portion of the land, and the proceeds represents the respective interests of the lessors in the premises. If there be life tenants and remaindermen, the former are entitled to the enjoyment of the fund (interest thereon) during life, and at the death of the survivor the corpus of the fund should go to the remaindermen." This distribution was made because all the interests concurred in making the lease, and it was to the manifest interest of all that the oil should be taken from the land lest it should be drawn away by other wells on adjacent premises. In that respect, of course, there is a difference between oil and gas, and solid minerals, but in respect of the interests of life tenants, as contrasted with those in remainder, there was no departure from the common-law rule that tenants for life only may not open new mines or take minerals from the premises, except in case of mines opened by the former owner. This was recognized in *Westmoreland Coal Co's Appeal,* 85 Pa. St. 344, where we held that while the life tenant's right to work previously opened mines was undoubted, there was no right in a life tenant of several tracts to open a new mine on one of the tracts upon which no

previous opening had taken place. Mercer, J., said, in the opinion: "Neither tract is appendant or appurtenant to the other. If she had a life estate in the distant tract only, the fallacy of claiming a right to remove the coal therefrom would be most manifest. The unanswerable reason would be that the mine on that tract had never been opened."

We see no difference between the present case and those cited, so far as this question is concerned. The plaintiff was but a tenant for life of the premises in question. There had never been any oil or gas operations commenced on the land before her estate for life accrued. She had no right therefore, to operate for oil or gas herself, and she could not give such a right to any lessee from her. Neither the original lessee nor the defendants, his assignees, ever held any such right. They would have been trespassers if they had undertaken to exercise such a right. The lease was "for the sole and only purpose of drilling and operating for petroleum, oil, or gas," and "to have and to hold the said premises for the said purpose only." All the terms and conditions of the lease relate to that purpose alone, and no right to the use of the surface for any other purpose is conferred. It is manifest, therefore, that as no interest whatever was acquired under the lease, the lessees are under no obligation to pay for a right or privilege which they never obtained, or in damages for not performing an illegal covenant therein. We think the judgment entered by the court below was entirely right.

It seems to us, however, in view of the peculiar character of oil and gas as being fugacious in their nature, and liable to be diverted by operations upon other adjoining or near-by lands, in order to preserve the interests of both life tenants and remaindermen, it would be well for the legislature to make such enactments as would enable the owners of this class of lands to secure to themselves the benefits of such minerals as these. As it is now, the law is not efficacious to that end.

Judgment affirmed.

To the same effect see Swayne v. Lone Acre Oil Co. (1905), 98 Tex. 597, 86 S. W. 740; Keon v. Bartlett (1895), 41 W. Va. 559, 23 S. E. 664, 56 Am. St. Rep. 884, 31 L. R. A. 128.

Acquiring Adverse Title.

WHITNEY v. SALTER, in Minn. Sup. Ct., Nov. 22, 1886—36 Minn. 103, 30 N. W. 755, 1 Am. St. Rep. 656.

Ejectment by the administrator of Ann Salter; who died possessed of a term for 100 years subject to a mortgage for $555 and a mechanic's lien for $884, and left a will by which she devised the term to the defendant William Salter, her husband, for life. After her death the liens were foreclosed and the purchasers at the sale conveyed their interests to defendant William. The court directed a verdict for defendant, and plaintiff appeals from an order denying a motion for a new trial.

By the Court, MITCHELL, J. The established doctrine is, that a tenant

for life in possession, in the purchase of an encumbrance upon, or an adverse title to, the estate, will be regarded as having made the purchase for the joint benefit of himself and the reversioner or remainderman. The law will not permit him to hold it for his own exclusive benefit, if the reversioner or remainderman will contribute his share of the sum paid. If the life tenant in such case pays more than his proportionate share, he simply becomes a creditor of the estate for that amount: 1 Washburn on Real Property, 96; *Daviess v. Myers,* 13 B. Mon. 511. It is also the settled doctrine, that if a life tenant of a renewable leasehold estate renews the lease, the law will not permit him to do so, for his own exclusive use, but will make him a trustee for the reversioner or remainderman. And this is so even although he was not required to renew: Bissett on Estates for Life, [26 Law Lib.] 248. The renewed lease in such a case is subject to the same equities as the original. Thus far we agree with the appellant. But this is not the whole law applicable to the facts of this case. Salter, the life tenant, was under no obligation to pay off or buy up these outstanding claims against the estate. The will under which he held the life estate imposed no such duty upon him. Neither did the law: 1 Washburn on Real Property, 96.

Whether in this case the life tenant should contribute towards the amount paid to remove these encumbrances is not here important. Undoubtedly, the general rule in regard to the apportionment of the contribution towards paying off encumbrances between the life tenant and the remainderman is, that the life tenant shall contribute in proportion to the benefit he derives from the liquidation of the debt: Story's Eq. Jur., sec. 487; 1 Washburn on Real Property, 96, 97.

In view of the fact that this life estate was given to Salter "in lieu of all estate, right, title, or interest" he might otherwise have in the estate of his wife, the testatrix, there may be some question whether he would be bound to contribute anything towards taking up these outstanding claims against the estate: See *Brooks* v. *Harwood,* 8 Pick. 497. But as the point is not really before us, we neither decide nor consider it. It is, however, certain, in any event, that Salter became a creditor of the estate for the amount he paid out, less his proportionate share, if any. To that extent he would be subrogated to the rights of the parties from whom he bought, and would be entitled to hold the property until the other parties interested paid their share. He and those claiming under him would occupy a position analogous to a mortgage in possession after condition broken, who cannot be ejected until all sums due on the mortgage have been paid.

Order affirmed.

That the life tenant cannot acquire and use an adverse title against the remainderman: De Freese v. Lake (1896), 109 Mich. 415, 67 N. W. 505, 63 Am. St. Rep. 584, 32 L. R. A. 744, tax-title; Boynton v. Veldman (1902), 131 Mich. 555; 91 N. W. 1022; Stewart v. Matheny (1888), 66 Miss. 21, 5 So. 387, 14 Am. St. Rep. 538, tax-title; Cockrill v. Hutchinson (1896), 135 Mo. 67, 36

S. W. 375, 58 Am. St. Rep. 564; Weaver v. Wible (1855), 25 Pa. St. 270, 64 Am. Dec. 696.

Numerous decisions to the effect that possession by or under a life tenant cannot be set up as adverse to the remainderman or reversioner are collected in 19 L. R. A. 839, in a note to Gindrat v. Western Ry. of A., 96 Ala. 162, 11 So. 372. See also King v. Rhew, post.

Time for Executors of Life Tenant to Remove.

STODDEN v. HARVEY, in King's Bench, Trinity, 5 Jac. 1.—A. D. 1608—Cro. Jac. 204.

Trespass. Upon demurrer the case was, lessee for life of a house and pasture land dies, his executors suffer his cattle to go there for six days after his death, and then remove them, and in trespass justify for that time, averring that in that time of six days they could not procure any other land or place to put in the cattle; whereupon it was demurred. And whether that were a convenient time to remove them was the question. The court seemed to incline that six days is but a convenient time to remove the cattle; and the law allows a convenient time for their removing, especially it being averred that they had not any other place to remove them. See 18 Edw. 4; 22 Edw. 4, pl. 27. But for a fault in the plea * * * it was adjudged for the plaintiff.

Curtesy Initiate.

ANON., in Common Bench, Hilary, 28 Hen. VIII.—A. D. 1537—1 And. C. P. 35 (Case 88), Dyer 25b, Bendloes 21.

If a man espouse a woman and have issue, which issue is born in life and baptised, and the issue dies not yet heard to cry; or if the issue is born in life and not baptised nor heard to cry; yet the husband shall be tenant by the curtesy. By opinion of the justices of the common bench.

Dower—How Barred. In Hereford, in Eyre, 20 Edw. 1, A. D. 1292, p. 21.

If a woman covert make quit-claim of her dower for her whole life it is worth nothing. Otherwise, if she is single.

CHAPTER IV.

ESTATES LESS THAN FREEHOLD.

ESTATES FOR YEARS.

Nature of Terms for Years.

BRACTON, book II, c. 9, fol. 27.—1256? (1240-1267).

If, moreover, a gift be made for a term of years, though of exceeding length longer than the life of man—nevertheless this will not give the donee a freehold, since a term of years is fixed and certain, and the limit of life is uncertain, and because, although nothing is more certain than death, nothing is more uncertain than the time of death. Moreover, if land be granted to a person for a term of years, the grantor may during the same term grant the same land to another or to the same person in fee; thus, if he enfeoffs the lessee, changing one kind of possession for another. If, however, he enfeoffs another, both kinds of possession will continue, because the term and feoffment of the same land may well coexist, since in that case there are different sorts of rights; the ownership of the fee and the freehold belong to the feoffee, while the lessee can claim nothing for himself except the usufruct, that is to say, he may freely and without hinderance on the part of the feoffee take the produce. Further one may give to another land to hold at will, or so long as he pleases, from term to term, or from year to year, in which case the donee has no freehold, for the lord of the fee may reclaim land thus granted as from one holding by mere grace and favor.

LITTLETON'S TENURES. (Littleton died in 1482.)

§ 58. Tenant for term of years is where a man lets lands or tenements to another for a term of certain years, after the number of years that is accorded between the lessor and the lessee. And when the lessee enters by force of the lease, then is he tenant for term of years. * * *

§ 59. And it is to be understood, that in a lease for years, by deed or without deed, there need be no livery of seisin made to the lessee, but he may enter when he will by force of the lease. * * *

§ 66. Also, if a man lets land to another for term of years, although the lessor die before the lessee enters into the tenements, yet he may enter into the same tenements after the death of the lessor, because the lessee, by force of the lease, has presently a right to have the tenements accord-

ing to the form of the lease. But if a man makes a deed of feoffment to another, and a letter of attorney to one to deliver to him seisin by force of the same deed; yet if livery of seisin be not executed in the life of him who made the deed, this avails nothing. * * *

Original Remedies of Ejected Termors.

BRACTON, Book 4, c. 36, fol. 220.—A. D. 1256? (1240-1267).

I must now speak of the case of a person being ejected from the use and occupation of any tenement which he holds for a term of years before the expiration of his term. For in one and the same tenement one man may have a freehold and another use and occupation. The usual remedy open to such lessees, when they are ejected before the expiration of their term is by action of covenant. But inasmuch as this action is not available except as between lessor and lessee, and third persons could not be bound by the covenant, and even as between lessor and lessee it was an insufficient and inconvenient mode of determining the matter, by the advice of the Curia Regis a remedy was provided which the farmer could avail himself of as against any person whatsoever who should turn him out of possession. This was by means of the following writ: 'The king, to the sheriff greeting. Command A that he duly and without delay do restore to B so much land with the appurtenances in such a township, from which the said A who demised the land to B' (had wrongfully ejected him, &c.), Or thus: 'If A gives proper security, summon B to show cause why he ejects and keeps ejected A from so much land with the appurtenances which C demised to A for a term which is not yet passed, and within the said term the said C sold the said land to B, by reason of which sale the said B afterwards ejected A from the said land as he saith;' &c. And if such a writ is available against a stranger on account of a sale to him, much more is it available against the lord himself who demised to and without reason ejected the lessee, than against a stranger who had no sort of excuse if at the time of the sale made to him his vendor ejected the farmer, or if on any other ground any one other than the original lessor has ejected the lessee. In that case the writ speaks of 'the land which C of N demised for a term which has not yet expired, within which term the aforesaid A or C wrongfully ejected B from the said land as he alleges;' &c. * * * No one can eject a farmer from his farm any more than he can eject a tenant from his freehold. Hence if it be the lessor who ejects the farmer let him restore the possession with damages for such a right of restitution does not differ much from the case of disseisin. But if the ejector be some person other than the lessor, if he have done the wrong by the authority and at the bidding of the lessor, both of them are liable to judgment, one because he did the act, and the other because he authorized it. But if the act was done against the will of the lord, then the wrongdoer is liable both to the lord of the fee and to the farmer, to the farmer by the writ which

I have mentioned, to the lord of the fee by the assize of novel disseisin, so that the one may recover the term with damages, and the other his freehold without damages. Further if the lord of the fee gives to anyone a tenement to hold in demesne which has been granted to another for a term of years, he may well grant to him the seisin without prejudice to the term of the farmer. For the lord may confer upon the grantee the seisin which he vacates so far as relates to himself and those claiming under him, and he can cause the farmer to attorn to the grantee and to render to him services, provided always that the feoffee may not enter into the occupation of the land itself, nor take any part of its produce, and in particular may not hinder the farmer in his enjoyment, nor eject him.

STATUTE, 21 HENRY VIII, c. 15.—A. D. 1529.

Fermers shall enjoy their leases against recoveries by feigned titles, &c.

Where afore this time divers persons have made leases of their manors, lands, tenements, and other hereditaments, sometime by their indentures, and sometime without writings, to other persons for term of years, taking of them great fines for the incomes of the same leases; and after the same leasors, their heirs, or assigns, have caused and suffered recoveries to be had against them in the court of our sovereign lord the king, and in other lords courts, upon feigned and untrue titles, by craft or covin to put the same termers from their said terms; and after such recoveries had the same recoverees, by reason of such recoveries and judgments, have entered into the same manors, lands, tenements, and other hereditaments so to ferm letten, and thereof have expulsed the said fermers, contrary to their said leases, covenants, and agreements; and because it was doubted to some persons, whether the said termers might falsify such recoveries, or not:

2. Be it therefore enacted, * * * that all such termers shall and may falsify, for his term only, such recoveries, as well heretofore had as hereafter to be had, in such wise and form as a tenant of a freehold shall and may do by the course of the common law, where such tenant of freehold was neither privy nor party to the same recovery.

3. And that the same termers, their executors and assigns, notwithstanding such recoveries so had, shall retain, hold, and enjoy their said terms, according to their said leases, against all such recoverees, their heirs and assigns, as they should or might have done against the said lessors, if such recovery had not been had he suffered; and that the said recoverers, their heirs, and assigns, after such recovery so had, shall have like remedy against the said termers, their executors or assigns, by avowery or action of debt, for the rents and services reserved upon the same leases, being due after the same recoveries; and also like actions against them for waste done, after the same recoveries so had; in like manner and form as the said leasors should or might have had, if the same recoveries had never been had. * * *

COKE LIT. *46a—A. D. 1620-30.

When Littleton wrote, if a man had made a lease for years by writing, and he that had the freehold had suffered himself to be impleaded in a real action by collusion to bar the lessee of his term, and made default, &c., the statute of Gloucester gave the lessee for years some remedy by way of receipt, and a trial whether the demandant did move the plea by good right or collusion; and if it were found by collusion, then the termor should enjoy his term, and the execution of the judgment should stay until after the term ended. But this statute extendeth not to five cases: 1. If the lease were without writing; for the words of this act are *so that the termor may have recovery by writ of covenant.* 2. It extendeth not but to a recovery by default. 3. The termor could not be relieved by this statute unless he knew of the recovery and were received, &c. 4. By the better opinion of books it extendeth not to tenants by statute merchant, statute staple, or elegit. 5. Not to guardian. But now the statute of 21 Hen. 8 doth give remedy in all the said cases saving the case of the guardian, and giveth them power to falsify all manner of recoveries had against the tenants of the freehold upon feigned and untrue titles. Now the statute saith that it was a doubt before the statute whether a termor for years might falsify or no; but yet it seemeth by the better opinion of books in so great variety, that he, having but a chattel, was not able by the common law to falsify a covenous recovery of the freehold, because he could not have the thing that was recovered.

Term Void for Uncertainty.

ANON, in Common Bench, 7 Edw. 6.—A. D. 1553.—Brooke Abr. t. Leases, 66.

A man possessed of a lease for a term of 40 years granted to J. N. as many of these years as should be arrear at the time of his death. This grant was held void by HALES and all the other justices, because of the uncertainty; for this is not like where a man leased land for the term of his life and four years more; this is certain that his executors shall have it for four years after his death. But in the other case the grantor may live the whole 40 years, and then nothing would be in arrear at the time of his death.

NOTE, by BROMLEY and the other justices, 2 Mary.—A. D. 1555—Brooke Abr. t. Leases 67.

If I lease land to W. N. *habendum* until it should pay 100 *l* and without livery this is merely a tenancy at will for the uncertainty, but if livery is made the lessee thereby shall have it for life on condition to cease when he has made the 100 *l.* And in Easter term 3 Mary, this lease was held good by all.

ANON., in chancery. A. D. 1583?—1 And. 122.

W. Kingswell, possessed of a lease for years, gave it in these words: "I give my lease of and in" &c., "after my decease to my son Swithin and his wife." The question was if this manner of grant was void or not; and this in the chancery, was referred by the chancellor to the CHIEF JUSTICES of the king's bench and common pleas to consider; who thought that the assignment or grant of the lease was void, and cannot take effect according to the words of it; for to make a lease so commence or end, as one had a lease in possession, may not be, and it is no more than to grant so much of his term as shall be to come after the death of the father; which is entirely void, for this that there is no knowing what thing in this case passes, and this for the uncertainty; and to hold that these words, *after the death*, &c., shall be void and on this to say that it is an assignment or gift of his term, viz., the residue, is against reason; for this is not the intent of the grantor. And of this opinion also were MEAD and PERYAM, JJ.

SAY v. SMITH, in Common Pleas, Easter term, 6 Eliz.—A. D. 1564—1 Plowd. Com. 269. Abridged.

[Replevin by William Say against John Smith and Thomas Fuller, for taking nine cows. The defendants justified the taking as bailiffs of Edmond Smith in whose freehold of 20 acres the cows were doing damage. Say rejoined that said Edmond had the freehold by devise in writing of William Norton, who in his lifetime, viz, 4 Hen. 8, leased the same to John Kirton, whose executor assigned said lease and term to Say, which lease produced in court demised the land to the lessee and his assigns for the term of ten years reserving to the lessor and his heirs and assigns a yearly rent of 4 *l.* 16 *s.* 8 *d.*, and a rent of 10,000 tiles, or their value in money payable at the end of said term; and further by said lease it was agreed and granted that, if at the end of said term and every succeeding term, the rent should be duly paid, said lessee, his heirs and assigns, should have a perpetual demise, farm, and grant of the premises from ten years to ten years on like rent continually and ensuing out of the memory of man. It was further alleged that the rent had been duly paid, and that by virtue of the lease and assignment the plaintiff was lawfully possessed of the premises, and being so possessed, the defendants wrongfully entered and took the cows.

To this the defendants demurred.]

[OPINION.] I heard the arguments of all the justices except WALSH, the latter end of whose argument I only heard; but they all argued to one effect, and agreed that the title of the plaintiff was not good, and that the defendants should have a return. * * * Then as to the principal matter, every contract sufficient to make a lease for years ought to have certainty in three limitations, viz. in the commencement of the term, in the continuance of it, and in the end of it. So that all these

ought to be known at the commencement of the lease, and words in a lease which don't make this appear are but babble, as BROWN said. And these three are in effect but one matter, showing the certainty of the time for which the lessee shall have the land, and if any of these fail it is not a good lease, for then there wants certainty. * * * So here the first term of ten years is good without question, but the term afterwards for other ten years is limited to commence after the performance of a condition, so that until the condition is performed the term cannot commence. And then if the condition ought first to be performed, it is first to be considered whether or no it is possible to be performed, and if it is now performed. And BROWN said that it is not possible to be performed, because the words of it are, that he shall have the lease if he pay the tiles or the value of them in money at the end of every ten years from thence next following. So that *every* ten years which shall next follow ought to precede the payment, and the payment the lease. And if the next ten years be passed he cannot pay the tiles or the value of them, for the payment ought to be at the end of every ten years. * * * So that until all ten years are passed the end of every ten years next following the date of the said indenture is not passed; and all ten years are not passed until the end of the world. Wherefore the end of the world ought to come before the payment, and the payment ought to come before the lease, and so the lease shall never commence. * * *

Then as to the certainty of the time of the continuance of the lease, although it should be here admitted that there is a certainty of the commencement of it, yet there is no certain space of time expressed by which the length of the term may be known, for it is appointed that upon the payment the lessee shall have a perpetual demise from ten years to ten years, which is as much as a demise for 20 years, and which words would have made a good lease for 20 years if he had stopped there, but he has coupled them with other words which make the whole uncertain, viz. that the demise shall be perpetual, and from ten years to ten years continually and out of the memory of man, which words, *perpetually, continually, and out of memory,* don't contain any certain term, but time without a term. * * *

From the above cases it will be seen that if it had not been for the fact that the form of the conveyance was insufficient to pass a freehold the titles of the lessees would have been sustained as creating estates for life, in which the uncertainty of duration is a common element. Therefore, since livery is no longer necessary to pass a freehold, and the word heirs is made unnecessary to pass a fee by deed, the questions discussed in these cases will now seldom arise. They might arise on a contest between the heir and the administrator as to whether it was a freehold or a chattel real. But that uncertainty as to the term would not now avoid the contract and estate is shown by the following cases: Reed v. Lewis (1881), 74 Ind. 433, 39 Am. Rep. 88; School Dist. No. 5 v. Everett (1883), 52 Mich. 314, 17 N. W. 926; D'Arcy v. Martyn (1886), 63 Mich. 602, 30 N. W. 194; Horner v. Leeds (1855), 25 N. J. L. 106; Lemington v. Stevens (1875), 48 Vt. 38.

"Said Crow hereby agrees to lease unto said Meinhart the following piece of ground [describing it] for the purpose of carrying on the business of a creamery thereon, and for the term of so long as said creamery is carried on as said business, for the sum or rent of one dollar for said lease in full," was held not to create a term nor any interest in the land, but a mere license; and therefore an attachment of the interest of the licensee as a leasehold was not sustained. Melhop v. Meinhart (1886), 70 Iowa, 685. 28 N. W. 545. To the same effect see also: Western Transp. Co. v. Lansing, 49 N. Y. 499.

ST. AUBY'S CASE, in the Exchequer, Easter, 31 Eliz.—A. D. 1590.—Cro. Eliz. 183.

Earl of Arundel being possessed of a term for years in lands, grants a rent to St. Auby for his life, issuing out of said lands, and dies. This is found by office, and the land now being in the queen's hands, *Drew* prays an allowance of this rent, the term yet having continuance for divers years. *Popham,* Att. Gen., moved that it was void to charge the land, for he cannot have a frank-tenement out of a chattel, and if he has not a frank-tenement according to the word of the grant, he can have no other estate, for it is not granted for any time certain.

MANWOOD, Chief Baron.—Although this cannot be a grant to make a freehold, yet it shall be a grant as it may be, viz., a grant for so many years as the term endures, if he live so long; for it is not a frank-tenement in law, but a chattel. To this opinion were GENT and CLERK, Barons, inclined, but said they would advise.

ACCORD: Butt's Case (in common pleas, 1600), 7 Coke (part 2) 23.

For the later history of this question see the cases on executory devises post—.

GOODRIGHT d. HALL v. RICHARDSON, in King's Bench, Mich., 30 Geo. III—A. D. 1790—3 Term 462.

In ejectment for a messuage and lands it was found by special verdict that Oct. 28, 1785, Wm. Child leased to James Moss (from whom defendant got title) the premises in question "at the yearly rent of 10 *l.*, payable half yearly, for and during the full end and term of 3, 6, or 9 years from the feast day of St. Thomas next ensuing * * * which shall be determinable in the years 1788, 1791, 1794" and the tenant covenanted to repair during the term or terms. Plaintiff's lessor, claiming by surrender from Child, gave notice Dec. 13, 1788, to quit by the next feast day of St. Thomas.

LORD KENYON, C. J. There is no doubt of what LORD MANSFIELD'S opinion would have been in *Ferguson* v. *Cornish,* 2 Burr. 1034, as to the validity of the lease beyond the first seven years. In these cases the intention of the parties ought to prevail, if it be not contrary to law. It is true that there must be a certainty in the lease as to the commencement and duration of the term; but that certainty need not be ascertained at the time; for if in the fluxion of time a day will arrive which will make it certain, that is sufficient. As if a lease be

granted for 21 years after three lives in being; though it is uncertain at first when that term will commence, because those lives are in being, yet when they die it is reduced to a certainty; and *id certum est quod certum reddi potest;* and such terms are frequently created for raising portions for younger children. Now in this case it is impossible to form any doubt respecting the intention of these parties. It was intended that this lease should take effect for three years at all events, and that it should be in the election of either of the parties to put an end to it at that time, or at the end of six years, giving reasonable notice to the other. It is like a lease for a year, and so from year to year; where, if the lessee wishes to determine it at the end of the year, he must give reasonable notice to the other party. And though here either of the parties might have determined the lease at the expiration of the first three years, yet when the time elapsed, at which notice ought to have been given for that purpose, the lease could not be determined till the end of the next three years. Consequently the lessor of the plaintiff is not entitled to recover.

ASHHURST, J. All that is required is either that the term should be certain in itself, or reducible to a certainty. Now that is the case here; for it is for three, six, or nine years, as the case may happen; the parties having agreed that it should be determinable in the years 1788, 1791, 1794. It is therefore a lease for three years certain, or for six or nine years unless the parties determine it sooner.

BUTLER, J. This is a lease for nine years, determinable by either of the parties at the end of the first three or six years; for it is stated in the case that it is *determinable in the years* 1788, 1791, 1794. But if it were not determined at either of these periods, the party first giving reasonable notice, it was to continue for the nine years.

GROSE, J. Of the same opinion. *Postea to the defendant.*

Validity of Oral Lease.

STATUTE OF FRAUDS, 29 Car. II. c. 3, Secs. 1-3.—A. D. 1676.

For prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury be it enacted by the kings most excellent majesty by and with the advice and consent of the lords spiritual and temporal and the commons in this present parliament assembled and by the authority of the same that from and after the four and twentieth day of June which shall be in the year of our Lord one thousand six hundred seventy and seven. All leases, estates, interests of freehold or terms of years or any uncertain interest of in to or out of any messuages, manors, lands, tenements or hereditaments made or created by livery and seisin only or by parole and not put in writing and signed by the parties so making or creating the same or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only and shall not

either in law or equity be deemed or taken to have any other or greater force or effect. Any consideration for making any such parole leases or estates or any former law or usage to the contrary notwithstanding.

SEC. 2. Except nevertheless all leases not exceeding the term of three years from the making thereof whereupon the rent reserved to the landlord during such term shall amount unto two-third parts at the least of the full improved value of the thing demised.

SEC. 3. And moreover that no leases, estates or interests either of freehold or terms of years or any uncertain interest not being copyhold or customary interest of in to or out of any messuages, manors, lands, tenements or hereditaments shall at any time after said four and twentieth day of June be assigned, granted, or surrendered, unless it be by deed or note in writing signed by the party so assigning, granting, or surrendering the same or their agents thereunto lawfully authorized by writing or by act and operation of law.

WHITING v. OHLERT, in Mich. Sup. Ct. 1884—52 Mich. 462, 18 N. W. 219, 50 Am. Rep. 265.

Assumpsit. Plaintiff brings error from judgment for defendant.

CAMPBELL, J. This was an action by a tenant against his landlord for disturbance in his enjoyment. The main dispute was concerning the validity of the lease. The testimony tended to show an agreement by parol in April for a year's tenancy from the beginning of May. The court below held that an agreement by parol for a full term of a year, to begin in the future, was void under the Statute of Frauds. That statute provides that all contracts for the leasing for more than one year of lands shall be void unless in writing. Comp L. [1871] § 4694 [How. St. § 6181.] The only other provision supposed to be involved is that which declares that every agreement which by its terms is not to be performed within one year must be in writing. Comp. L. § 4698.

The distinction between an agreement for a lease and the lease itself was pointed out in *Tillman* v. *Fuller* 12 Mich. 113. It is very well settled that a lease may be made to take effect in future, and that the estate does not begin with the contract, but with the future period. *Young* v. *Dake* 5 N. Y. 463; *Trull* v. *Granger* 8 N. Y. 115; *Wood* v. *Hubbell* 10 N. Y. 479. It is held in New York, under a statute corresponding to ours, that an agreement by parol for a future term not exceeding one year is valid, and not within the statute. *Young* v. *Dake* 5 N. Y 463. That case is well considered, and is, we think, a fair construction of the statute, which ought not to be given a strained meaning. The same doctrine has been adhered to in that state, and is re-affirmed emphatically in *Becar* v. *Flues* 64 N. Y. 518, where a tenant was held liable for the agreed rent, who had never gone into possession, and had declined to do so.

Concurring, as we do, in this view of the law, we think the court below erred in its ruling, and should have allowed a recovery of damages

for the injury done plaintiff. We note further in the record that the right of possession seems to have been determined in plaintiff's favor in proceedings before a commissioner, and we cannot understand why on any theory his recovery, to some extent at least, was questionable. But as tenant for a year he was of course entitled to larger damages.

Judgment reversed.

Accord: Sears v. Smith, 3 Colo. 277; Steininger v. Williams, 63 Ga. 475; Huffman v. Starks, 31 Ind. 474, Gregory, J., dissenting; Sobey v. Brisbee, 20 Iowa, 105; Paulton v. Kreiser (1904), 18 S. Dak. 487, 101 N. W. 46.

The weight of authority is against this case. Bain v. McDonald, 111 Ala. 272, 20 So. 77; Wickson v. Monarch Cycle Mfg. Co. (1900), 128 Cal. 156, 60 Pac. 764, 79 Am. St. Rep. 36, and cases there cited. Wheeler v. Frankenthal, 78 Ill. 124; Wolf v. Dozer, 22 Kan. 436; Mathews v. Carlton (1905), 189 Mass. 285, 75 N. E. 637; Jellett v. Rhode, 43 Minn. 167, 45 N. W. 13, 7 L. R. A. 671; Johnson v. Albertson, 51 Minn. 335, 53 N. W. 642; Whiting v. Pittsburgh Opera, 88 Pa. St. 100, "from the making thereof."

Tenant or Servant.

HAYWOOD v. MILLER, in N. Y. Sup. Ct., May 1842—3 Hill 90.

Miller sued Haywood in trespass for ejecting his goods from a dwelling house on Haywood's *lower* farm, which plaintiff occupied under an agreement that he would labor on the farm for a year and that his wife would do the house-keeping; for all of which Haywood agreed to pay him $160. Haywood asked Miller to work on the *upper* farm, which Miller refused to do, whereupon Haywood discharged him, gave him notice to leave, and finally entered and put out his furniture. From judgment for $200 for plaintiff, Haywood brings error.

PER CURIAM. The contract was not in the nature of a lease. Whether the lower farm was intended as the place of labor or not, the relation between these parties was merely that of master and servant. True, it is assumed by the contract that the defendant below should furnish a house; and so does every master agree to furnish a house, or house-room, which is the same thing, for his domestic servants. It does not follow that, when he becomes dissatisfied and gives his servant warning to depart, and the latter refuses, that the master may not turn the servant away and remove his goods. To be sure, the master does this under the peril of paying damages for a breach of the contract with his servant, if he cannot show good grounds for dismissing him. But he is not a trespasser, whether he have good cause or not. Here the labor was to be on a salary of so much for the year. Suppose the plaintiff below had refused to work and held over the year; could the defendant have distrained for rent, or sued for use and occupation? Or could the plaintiff have had ejectment for the ouster within the year? Clearly neither; and that shows there was no more a tenancy created,

than there would be under any other retainer for a year's service. The mistake lies in the form of action—in bringing trespass, and not assumpsit. The judgment must be reversed.

Judgment reversed.

LIGHTBODY v. TRUELSEN et al., in Minn Sup. Ct., Nov. 2, 1888—39 Minn. 310, 40 N. W. 67.

The plaintiff claiming to be tenant of some boarding houses, sues the defendant sheriff and under-sheriff for wrongfully ejecting him.

The Minnesota Granite & Stone Co., needing some place to house its employees at its quarry, built these houses, and the plaintiff went into possession under a contract with the company, by which he agreed to furnish the house and board and lodge all the men sent him by the company for $4.50 per week, to be paid him by the company and by it deducted from the men's wages, the company also deducting from the board money $60 per month for the rent of the houses. The plaintiff agreed to give personal and constant supervision to the house and not to be absent without the consent of the company's superintendent. The superintendent becoming dissatisfied, ordered plaintiff to leave and remove his goods. This being refused, he had the defendants remove them. The court below gave plaintiff judgment for $1,000 damages and the defendants appeal.

MITCHELL, J. * * * If plaintiff was merely the servant of the Company, employed to manage the boarding-houses for them, there could be very little doubt but that his use or occupancy of the buildings was also as servant, and not as tenant, being merely accessory to the more convenient performance of his duties as servant. If the use or occupancy be as servant, the law is well settled that the master does not part with the possession, the servant's possession being the master's. If the servant is discharged, he must, on request, quit the premises; and, if he refuses to go, the master may eject him, and for that purpose use such force as is reasonably necessary. The master's right in this respect does not depend upon the question whether the servant is rightfully or wrongfully discharged, but exists in the one case as well as the other; the master incurring the risk of paying damages for breach of the contract of employment, which would be the servant's only remedy. But the question here is, was plaintiff the servant of the company at all, or was he their tenant? A tenant may be defined to be one who has possession of the premises of another in subordination to that other's title, and with his consent. No particular form of words is necessary to create a tenancy. Any words that show an intention of the lessor to divest himself of the possession, and confer it upon another, but of course in subordination to his own title, is sufficient. While, of course, the existence of certain things is necessary to constitute a lease, there is no artificial rule by which the contract is to

be construed. It is largely a question of the intention of the parties, to be collected from the whole agreement. It seems to us that the agreement in the present case all looks to a leasing of these boarding-houses to plaintiff, and not to an employment of him as agent to manage them for the company. Every provision of the contract contemplates his occupancy as landlord or proprietor. There is nothing to indicate that his possession of the buildings was not to be exclusive; on the contrary, the nature of the business, and the manner in which it was to be run, necessarily imply that it was to be exclusive. He was to run the business, not for the benefit of the company, but for himself; the profits, if any, being his, and the losses, if any, he would have to stand. He took his chances on the number of boarders he would get; the company did not obligate themselves to furnish any particular number. He furnished the houses and provided the supplies at his own expense, just as any boarding-house keeper would do, if running the business as principal, and not as agent for another. What was paid him was for boarding the men, and not as compensation for services as agent. Moreover, he had to pay a fixed rent for the use of the buildings, the amount of which was not at all dependent upon the number of boarders the company furnished. It was to be the same whether they furnished one or one hundred. The manner in which the board-bills of the men or the rent for the buildings were paid is unimportant. That was a mere question of convenience. The fact that plaintiff was obligated to board the company's men, and that he was to give his time to the supervision of the boarding-houses, is not at all inconsistent with the idea of a lease. In short, the whole contract, in our judgment, shows an intention, not to employ plaintiff's services as agent, but to lease the buildings to him, with just such covenants and conditions as to the manner of their use and the mode of conducting the business as would naturally be incorporated into a lease, in view of the relation the buildings bore to the company's business. * * *

Judgment affirmed.

BOWMAN v. BRADLEY, in Pa. Sup. Ct., Oct. 3, 1892—151 Pa. St. 351, 24 Atl. 1062, 17 L. R. A. 213.

Action in trespass. From judgment for plaintiff, defendant appeals.

WILLIAMS, J. The question on which this case turns is one of considerable practical importance, and in this state it seems to be an open one. The learned trial judge finding no precedent in our own reports to guide him turned to the English courts, and followed what he believed to be the rule held by them. He stated at the same time that the question was one that could "only be settled by a decision of the supreme court." The facts on which the question arises are mainly undisputed. They show that Bradley owned a farm in Dauphin county containing

about twenty-nine acres. About four or five acres of this were occupied by a mill and pond operated by the owner. To care for the balance and the stock upon it he hired Bowman and his family. The farm work and the care of the cattle were to be looked after by Bowman. His wife was to milk the cows. His son was to deliver the milk each morning to Bradley in the city of Harrisburg. For this labor Bowman was to receive one dollar per day and the use of a house upon the premises to be occupied by himself and family. The only fact in dispute was the duration of the contract. The plaintiff alleged it was to continue for one year. The defendant asserted that it was terminable at his pleasure. He says that he told Bowman " I will try you, and on your terms, and if you don't suit me I will discharge you and expect you to leave the premises on sight." Which was the true version was a question of fact for the jury. If they found with the defendant that was an end of the plaintiff's case unless by some arbitrary rule of law the employee was turned into a tenant for years. On the other hand if they found the contract was for one year the plaintiff was entitled to recover unless the defendant could show a sufficient reason for terminating it sooner. The first question therefore that presented itself on the trial was over the nature and extent of Bowman's right to the house from which he was ousted by the defendant. Was that right an incident of the hiring and dependent on the continuance of the relation of employer and employee, or had it an independent separate existence, so that he was to be treated as a tenant for years with a right to remain in possession for one whole year whether he remained in the employment of the owner or not?

This was a question of law. The terms of the contract, so far as the parties differed, it was the duty of the jury to determine; but the terms being fixed, their legal import was for the court to declare. This should be determined upon a consideration of the nature and purpose of the contract, and the character of the business to which it relates; and analogies furnished by cases arising under the poor laws in England or in this country, while they may be helpful in some respects, ought not to be controlling. The subject of this contract was labor. Labor was what Bradley needed and undertook to pay for. It was what Bowman offered to furnish him at an agreed price. The labor was to be performed upon the land in its cultivation, in the care of the cows, and the delivery of the milk. As Bowman was not a cropper, or tenant paying rent, his possession of the land and the cows, and the implements of farm labor, was the possession of his employer. The barn was used to stable the cattle and store their feed. The house was a convenient place for the residence of the laborer. The house, the barn, the land, the cattle, the farming tools were turned over into the custody of the man who had been hired to care for the property; but he had no hostile possession, no independent right to possession. His possession was that of the owner whom he represented, and for whom he labored for hire.

This is not denied as to the farm, the barn, the stock, or the tools,

but an attempt is made to distinguish between the house and everything else that came into the possession of the employee in pursuance of the contract of hiring. There is no solid ground on which such a distinction can rest. If the possession of the house be regarded as an incident of the hiring, the incident must fall with the principal. If it be regarded as part of the compensation for labor stipulated for, then the right to the compensation ceased when the labor was discontinued.

Bowman had the same right to insist on the payment of the cash part of his wages as on that part which provided his family a place to live. His right under the contract of hiring was like that of the porter to the possession of the porter's lodge; like that of the coachman to his apartments over the stable; like that of the teacher to the rooms he or she may have occupied in the school buildings; like that of the domestic servants to the rooms in which they lodge in the house of their employers. In all these cases and others that might be enumerated the occupancy of the room or house is incidental to the employment. The employee has no distinct right of possession, for his possession is that of the employer, and it cannot survive the hiring to which it is incidental, or under which it is part of the contract price for the services performed. So in this case, if the contract was simply a contract for labor at one dollar per day and a house to live in, the plaintiff held the house by the same title and for the same purpose that he did the land or the cattle in the care of which his labor was to be performed. When his contract ended, his rights in the premises were extinguished, and it was his duty to give way to his successor. The jury might have found the disputed term of the contract in the plaintiff's favor and that the contract was made in express words for one year. In this case the defendant would be called upon to explain his conduct in discharging the plaintiff before the time for which he was hired had expired; and the jury would have to determine whether his conduct was a violation of the contract on his part, or was justified by the reasons assigned. But the plaintiff's declaration is not drawn upon this basis. It does not allege a violation of contract but a trespass. It asserts that the plaintiff was "in the lawful and peaceful possesion of a certain dwelling-house, messuage and tract of land," and that the defendant "with a high hand entered upon said close * * * and forcibly threw out of said dwelling the furniture and property of said plaintiff and exposed the same to the weather and broke and injured the same." The damages alleged are for injury to the furniture, and money paid to secure another house for himself and family. The case seems to have been begun, and tried, by the plaintiff on the theory that his right to the possession of the house was superior to his right to remain in the defendant's service; and that while his employer might dismiss him from the one at any time, he could not oust him from the other until the expiration of one full year. Such a theory cannot be sustained by proof of a contract for labor at a fixed price per day and a house to live in. It can only be supported by proof of a contract for one year's occupancy of the

house. Both parties agree that the contract in this case was one of hiring. There is no pretense of a separate lease for the house. The compensation for its use was in the labor to be performed on the premises. When the labor ceased on the nineteenth of July, the plaintiff ceased to pay for his occupancy. By ceasing to labor without remonstrance or objection he must be held to acquiesce in the defendant's right to terminate the contract for labor. If that contract was rightfully terminated then the plaintiff's right to the house was at an end and he could be lawfully put out of possession.

These views sustain the first and second assignments of error. The fifth assignment is also sustained. It is not necessary that occupation of a house, or apartments, should be a necessary incident to the service to be performed in order that the right to continue in possession should end with the service. It is enough if such occupation is convenient for the purposes of the service and was obtained by reason of the contract of hiring.

For the reasons thus given the judgment in this case is reversed.

Farm Hand in Cottage.—A tenant under a lease containing a condition not to sublet, employed a man to work on the farm, and gave him possession of a house on it. The court held this was not a subletting within the terms of the lease, and no forfeiture, because the man let into the house was there as servant and not as tenant. Vincent v. Crane, (1903), 134 Mich. 700, 97 N. W. 34, citing Kerrains v. People, and Chatard v. O'Donovan, below.

A Mill Hand hired for the year at thirteen shillings per day was furnished a cottage near the mill for his family, so he could be near his work, paying no rent. The employer discharged him, and in an attempt to remove him and his goods from the house was resisted. This is a prosecution of the servant for assault with intent to kill. The case turned on whether the defendant was tenant, in which case he could use all force necessary to protect his house from unlawful intrusion; or whether he was a servant merely, in which case he could make no resistance except to avoid bodily harm to himself or family not avoidable by retreat. The court held he was a mere servant. Kerrains v. People (1875), 60 N. Y. 221, 19 Am. Rep. 158, Finch Cas. 713.

A Methodist Parson was removed from the parsonage by the trustees of the church, leased to the church ladies guild and occupied by the parson without rent. In a suit by him in trespass for the removal, the court held that defendants were liable, because he was tenant, not servant—certainly not their servant because not employed by them but sent by the conference. Bristor v. Burr (1890), 120 N. Y. 427, 24 N. E. 937; 8 L. R. A. 710.

A Roman Catholic Priest was removed from office by the bishop in charge of the diocese, who owned the parsonage in fee in trust for the congregation; and was given notice to quit, which was too short if he was tenant at will. In an action to recover possession, the court held that he was servant and not tenant, and so entitled to no notice to quit. **Chatard v. O'Donovan (1881), 80 Ind. 20, 41 Am. Rep. 782.**

License or Lease.

KITCHEN v. PRIDGEN, in N. Car. Sup. Ct., Dec., 1855—S Jones Law 49, 64 Am. Dec. 593.

Trespass quare clausum fregit. Plaintiff claimed possession under one Herring, and alleged that he had occupied a house on the land for sev-

eral months where he lived, had a cook, and employed several men cutting wood, and that he was in possession of the land. A witness testified that he saw plaintiff pay Herring $7, and heard him say: "You can go on and cut as long as you choose, paying 25 cents per cord." The jury were charged that plaintiff was a tenant from year to year and entitled to notice to quit, and in absence of evidence of such notice, plaintiff was entitled to recover. Verdict and judgment for plaintiff. Defendant appealed.

By Court, Battle, J. A tenancy from year to year is a species of term for years, from which, however, it is distinguished, inasmuch as the duration of the term is not limited. It is distinguished from a tenancy at will, inasmuch as it is raised only by construction of law as a substitute for an estate at will; therefore, although *prima facie* all leases for uncertain terms create a tenancy at will, courts of law have for a long time construed such leases to constitute a tenancy from year to year, especially where an annual rent is reserved. Thus, where land was leased to A. for a year, and so from year to year, as long as both parties should agree; so, a general parol demise at an annual rent; so, where the occupier, under an agreement for a lease at a certain rent, pays the rent; so, where a tenant for life, under a limited power of leasing, granted a lease exceeding his power, but the remainderman accepted the rent; so, a tenant who holds over after his term has expired, and the lessor accepts rent; so, a parol demise for a longer term than three years, which is void by the statute of frauds: 2 Crabbe on Real Estate, 416, 417; 55 Law Lib. 265, 266. All these are cases where the law will, by implication, raise a tenancy from year to year; and it will be seen that in them all there is a reference to an annual occupation of the premises, and a corresponding payment of rent. The mode of determining this tenancy by a notice to quit is what properly distinguishes it from an estate at will; for, although this latter estate cannot, as a rule, be determined without a demand of possession, yet this is for the most part all that is necessary, though there are cases still occurring where the estate is so strictly at will that even a demand of possession is not required: 2 Crabbe on Real Estate, 418. A tenancy from year to year can be put an end to only by either party's giving a regular notice to quit, which must be given half a year previous to the expiration of the current year of tenancy, so as to expire at the period of the year at which the tenancy was commenced: Id. 423. Tenancies from year to year do not determine by the death of the tenant, but devolve on his personal representative, who must have half a year's notice to quit: 1 Cru. Dig., tit. Estate at Will, 285; *Doe* v. *Porter*, 3 Term 13.

Such being a tenancy from year to year, we shall look in vain for anything in the testimony set out in the bill of exceptions which shows, or has a tendency to show, that it existed in the present case. Neither of the plaintiff's witnesses says a word about a lease, an annual occu-

pation, or the payment of an annual rent. One of them does indeed state that Herring, who then owned the land, and from whom the defendant soon afterwards purchased it, complained that the plaintiff had not paid him "the rent which he had agreed to pay;" but this we soon afterwards learn was not for the occupation of the land, but for wood for which Herring had permitted him to cut at twenty-five cents per cord; and then, upon his paying seven dollars, Herring told him he might cut as long as he chose upon the same terms. This agreement certainly did not constitute a lease for a year, or a tenancy from year to year, even of the trees which were to be cut into wood. No particular time is mentioned at which it had commenced, or was to commence. There was no reference to a year, or a number of years, for its continuance, or for the payment of an annual rent. It did not seem to be contemplated that the plaintiff should be compelled to continue the business until he had given half a year's notice of his intention to quit; and we can hardly think that he had such an interest as would, upon his death, have devolved on his executor or administrator. In the absence of these qualities, the agreement between Herring and the plaintiff could not create a tenancy from year to year. If this be so, the purchase of the land by the defendant did not alter the nature of the transaction. At most, it was but a tenancy at will of the trees, and such portion of the land as was necessary to enable him to cut them; and it may well be doubted whether it was anything more than "a mere personal contract, not attaching to the land, or passing, or intending to pass, any estate in it, but resting entirely in contract:" See *Mhoon* v. *Drizzle,* 3 Dev. L. 414. It is sufficient for us to say that it was not a case of tenancy from year to year; which puts an end to the action, without reference to any other question. The judgment must be reversed and a *venire de novo* awarded.

Judgment reversed.

Farming on Shares.

KELLY v. RUMMERFORD, in Wis. Sup. Ct., May 8, 1903—117 Wis. 620, 94 N. W. 649, 98 Am. St. Rep. 951.

Replevin for half of crop of potatoes raised by defendant on plaintiff's land. Defendant at the time of digging notified the plaintiff of his intention to divide the crop in the field, and accordingly left half in a pile in the field and took half away as his own, for which this suit is brought. Plaintiff objected to the right of the defendant to divide the crop, but not to the manner of division. Defendant had judgment for the return of the property or its value ($30) and costs. Plaintiff appeals.

CASSODAY, C. J. It is sometimes difficult to determine whether a person who works the land of another on shares is a tenant in com-

mon of the crop with the owner of the land or a mere cropper. Much depends upon the wording of the contract between the parties. *Lanyon* v. *Woodward,* 55 Wis. 652, 13 N. W. 863; *Carrier* v. *Atwood,* 63 Wis. 301, 24 N. W. 82; *Wood* v. *Noack,* 84 Wis. 398, 54 N. W. 785; *Rowlands* v. *Voechting* (Wis.) 91 N. W. 990; *Warner* v. *Abbey,* 112 Mass. 355. In the case at bar there is practically no dispute as to the facts. The plaintiff furnished the land and the seed. The defendant was to plow the ground, plant and care for and harvest the potatoes, and have one-half of what should be raised. After plowing the ground and planting the potatoes, the defendant moved away. Finally, his son-in-law came, and went over the potatoes with a cultivator one way and partly over them the other way. But the potatoes became badly damaged for want of care, and finally the plaintiff got another man to care for the potatoes, and agreed to give him a share of the crop for doing so. The defendant testified to the effect that the plaintiff was to furnish the land and the seed, and that he was to cultivate the ground and have half of the crop, provided he stay there; and, if he did not stay, and no one else would buy, then the plaintiff would buy his share of the potatoes. The trial court manifestly held that the parties were tenants in common of the crop. If such was the relation of the parties, then the decision may be justified. Section 4257, Rev. St. 1898; *Foley* v. *The S. L. Co.,* 94 Wis. 329, 68 N. W. 994; *Sullivan* v. *Sherry,* 111 Wis. 476, 87 N. W. 471, 87 Am. St. Rep. 890; *Orcott* v. *Moore,* 134 Mass. 48, 45 Am. Rep. 278. If, on the other hand, the defendant was a mere cropper, then the decision was wrong. The general rule is that: "The legal possession of the land, as well as the title to the entire crop, is in the owner of the soil. The possession of the cropper being merely that of a servant, and incident to his right and duty of entering the close for the purpose of planting, cultivating, and gathering the crop, it is not the legal possession of premises which usually gives the possessor the title to the produce. He has no property in his share of the crop until the division which is made by the owner of the land." 8 Am. & Eng. Ency. Law (2d Ed.) 324, 325. It is there said that: "The term 'cropper' is applied to a person hired by the landowner to cultivate the land, receiving for his compensation a portion of the crop raised." Id. So it was said in an early case in Pennsylvania that: "If one hires a man to work his farm, and gives him a share of the produce, he is a cropper. He has no interest in the land, but receives his share as the price of his labor. The possession is still in the owner of the land, who alone can maintain trespass." *Fry* v. *Jones,* 2 Rawle, 12. In a later case in the same state it was held that an "agreement to farm land on shares is a contract of service, and not of lease, and a person doing the farming is a mere cropper, and not a tenant, and has no interest in the land." To the same effect, *Steele* v. *Frick,* 56 Pa. 172; *Adams* v. *McKesson's* Ex'x, 53 Pa. 81, 91 Am. Dec. 183. Thus it has been held in North Carolina that: "Where a person agrees to work on the land of another for a share of the crop,

the cropper cannot convey a legal title to his share of the crop to a third person before an actual division and appropriation." *McNeely* v. *Hart*, 32 N. C. 63, 51 Am. Dec. 377. To the same effect, *Brazier* v. *Ansley*, 33 N. C. 12, 51 Am. Dec. 408; *Harrison* v. *Ricks*, 71 N. C. 11. In this last case it is said that: "A cropper has no estate in the land. That remains in the landlord. Consequently, although he has, in some sense, the possession of the crop, it is only the possession of a servant, and is in law that of the landlord. The landlord must divide off to the cropper his share. In short, he is a laborer receiving pay in a share of the crop." That is referred to approvingly in *Strain* v. *Gardner*, 61 Wis. 184, 21 N. W. 35. Perhaps it would have been more proper to have used the word "landowner" instead of "landlord." We must hold that the defendant was a mere cropper, and that the plaintiff remained all the time the legal owner of the whole crop, and hence was entitled to recover in replevin.

The judgment of the circuit court is reversed, and the cause is remanded, with direction to enter judgment in favor of the plaintiff in accordance with this opinion.

FARROW v. WOOLEY, in Ala. Sup. Ct., Feb. 12, 1903.—138 Ala. 267, 36 So. 384.

This is an action by Wooley & Jordan of two counts, one in trespass for taking, the other in trover for converting, two bales of cotton; which was grown by Pratt on Tillman's land under an agreement by which Tillman furnished the stock and land and Pratt the labor, the crop to be divided equally. Pratt gave Wooley & Jordan a mortgage on the crop in February, and delivered these two bales to them in the fall to apply on the mortgage. Tillman took the cotton from their premises and delivered it to defendant, Farrow, who gave him credit on account for it, knowing all the circumstances. The justice's judgment for plaintiffs was affirmed in the circuit court, and the defendant appeals.

DOWDELL, J. The undisputed evidence showed that no force or violence was used in taking the cotton, and that the legal title to the cotton was in Tillman, from whom the defendant purchased it. The defendant was entitled to the affirmative charge as requested and the court erred in its refusal. *Jordan* v. *Lindsay*, 132 Ala. 567, 31 So. 484; Code 1896, § 2712. The cases of *Collier* v. *Faulk*, 69 Ala. 58; and *Adams* v. *State*, 87 Ala. 89, 6 So. 270, and the other cases following the Collier-Faulk decision, in addition to those mentioned in *Jordan* v. *Lindsay*, supra, must be overruled.

Reversed and remanded.

MEYER v. LIVESLEY, in Ore. Sup. Ct., Nov. 28, 1904.—45 Ore. 487, 78 Pac. 670, 106 Am. St. Rep. 667.

BEAN, J. This is a suit to restrain the defendants from trespassing upon or interfering with the plaintiff's possession of a hop-yard. On March 7, 1900, I. M. Simpson, being the owner of a certain tract of land in Polk county, upon which the hop-yard in question was situated, leased the yard, with the improvements thereon, consisting of dry kiln, hop poles, etc., to the defendants, for the years 1900 to 1904, inclusive. On October 25, 1902, the defendants sublet the yard, together with the hop kilns, baler and farming implements mentioned in the lease from Simpson to them to W. D. Huston, agreeing to furnish Huston one of the dwelling-houses on the Simpson place, or to remodel another building thereon, and the use of Simpson's horses in the cultivation of the hops at a certain stipulated rate per day, in consideration of which Huston agreed to pay them, as rental, one-fourth of the "average quality" of the hops produced on the land during the years of 1903 and 1904. On January 11, 1904, Huston assigned to the plaintiff all his right and interest in and to the lease or contract between himself and the defendants. This assignment was not recorded, and on January 23, 1904, the defendants, without knowledge or notice thereof, entered into a new lease with Huston for the current year, taking from him a mortgage on his interest in the crop to be grown during that year to secure a balance due for advances made the previous year. It was stipulated in the new lease that, in case of a violation of any of its terms by Huston, the defendants should have the right to re-enter and take possession of the hop-yard, to complete the cultivation of the crop, and harvest and sell it, paying over the surplus, if any, to Huston. In March, 1904, the defendants attempted to enter and take possession of the hop-yard, on account of a violation of the provisions of the lease or agreement between them and Huston, when this suit was brought by the plaintiff to enjoin them from doing so.

The only question we deem it necessary to consider is whether the lease from the defendants to Huston, made in October, 1902, was assignable by Huston without the consent of the defendants. The plaintiff claims title under such an assignment, but, unless Huston had authority to assign the lease to him, he has no standing in court, and the other questions become immaterial.

As a general rule, the power of assignment is incident to the estate of a lessee of real property, unless it is restrained by the terms of the lease: Wood on Landlord and Tenant, p. 529; Taylor on Landlord and Tenant, 9th ed., sec. 402. But a lease of land upon shares, including the use of buildings, farm implements, stock and other personal property is regarded as a personal contract, and not assignable without the consent of the lessor, because the amount to be received by the lessor, and the care of the property depend upon the character, industry and skill of the lessee: Taylor on Landlord and Tenant, 9th ed., secs. 24, 24a; *Randall* v. *Chubb,* 46 Mich. 311, 41 Am. Rep. 165, 9 N. W. 429; *Lewis* v.

Sheldon, 103 Mich. 102, 61 N. W. 269. *Randall* v. *Chubb* is much in point. Chubb leased certain premises to Stoddard upon shares for the term of three years with the privilege of five. Stoddard was to do all the work, find all the seed, and deliver to the lessor one-third of the crop. The farm was to be cropped in a certain specified way, and, as in the case at bar, the lessee was to have the use of certain property belonging to the lessor. The court held that the lease was not assignable, and that an attempt to assign it worked a forfeiture of the estate of the lessee, and the lessor could take immediate steps to recover possession. "The very nature and character of the lease or agreement," says Mr. Chief Justice Marston, "shows that it was a personal one to the defendant, and could not be assigned by him to a third party without the consent of his lessor. The rent or share which the latter would receive must depend very much upon the character of the lessee, and the latter could not place a party in possession of the premises who might not be a good husbandman, and who might not be able to carry on the farm operations in a good, careful and proper manner. Under such a lease the landlord has a right to choose his tenant, and he may be willing to lease upon shares to one man, and yet be wholly unwilling to let another have possession upon any terms. So, with reference to the use of his farm implements, one might be a careful, prudent man, who would take good care of them, while another, more reckless, would not by the owner be permitted to use them upon any terms." The same principle was reaffirmed in *Lewis* v. *Sheldon,* 103 Mich. 102, 61 N. W. 269.

The cases of *Dworak* v. *Graves,* 16 Neb. 706, 21 N. W. 440, and *Yates* v. *Kinney,* 19 Neb. 275, 27 N. W. 132, are not in fact in conflict with this doctrine. They involve the right of a lessee of property on shares to sell or mortgage his interest in the crop after it has been grown without the consent of the lessor, and not the right to assign or transfer all his estate or interest under the lease to another before the crop is raised. The terms of the lease from the defendants to Huston bring it directly within the doctrine of the Michigan cases. The lease included not only the hop-yard, the successful cultivation of which necessarily depended upon the industry and skill of the lessee, but also the use of certain buildings, farm implements, and personal property the care of which likewise depended upon the character of the lessee. In addition to this, the lease is indefinite as to its terms. It does not contain any stipulation as to the manner in which the hops shall be cultivated, cared for, harvested, or prepared for the market—provisions usual in leases of real property. Its nature and terms would seem to indicate that it was made by the defendants in reliance upon the ability, character, and skill of Huston. From the character of the agreement and the subject-matter thereof, we are led to conclude that it was a personal contract, which Huston could not assign or transfer so as to substitute another in his place as lessee without the consent of the defendants.

These views result in the reversal of the decree and the dismissal of the bill, and it is so ordered.

Right to Rent Arrear on Death of Lessor.

TEMPLE v. TEMPLE, in Common Bench, 42 & 43, Eliz.—A. D. 1601.—Cro. Eliz. 791.

Debt. A rent was granted to baron and feme for their lives, the rent was arrear; the baron dies; another rent was arrear; the feme dies intestate; and her administrator brings debt for the arrearages due in the life of the baron and after.

The Court resolved that it well lay, because the arrearages survived to the feme as well as the rent itself. * * *

Landlord's Right to Enter and Inspect During—Term.

HUNT v. DOWMAN, in King's Bench, Trinity, Jac. 1.—A. D. 1618—Cro. Jac. 478.

Action on the case; whereas the defendant, being lessee for years, the reversion in fee to the plaintiff (and shows how), the plaintiff coming to the house to see if any waste was committed therein, or any defect in the reparations, that the defendant disturbed him, and would not suffer him to enter and view the waste, by reason whereof he is without remedy to punish the same; and after verdict for the plaintiff upon not guilty pleaded, it was moved in arrest of judgment, that this action lay not: 1. because it was not shown that waste was done * * * 2, that it was never seen before this present that such an action had been brought, and therefore it is not allowable. But ALL THE COURT, held, that the action was maintainable; for, as to the first objection, the law will not presume that he can come to a precise knowledge what waste is done without a view. * * *

Warranty of Safety and Fitness.

LIBBEY v. TALFORD, in Me. Sup. Ct., 1861—48 Me. 316, 77 Am. Dec. 229.

Assumpsit to recover for damages to goods in plaintiff's store by want of repairs promised by defendant after leasing to plaintiff. Nonsuit ordered. Plaintiff appealed.

By Court, APPLETON, J. In the lease of a store or warehouse, there is no implied warranty that the building is safe, well built, or fit for any particular use: *Dutton* v. *Gerrish,* 9 Cash. 89 [55 Am. Dec 45]. So, in a lease of a house, there is none that it is reasonably fit for habitation: *Foster* v. *Peyser,* Id. 243 [57 Am. Dec. 43]; *Cleves* v. *Willoughby.* 7 Hill, 83. On a demise of the vesture of land for a specific term, and at a certain rent, there is no implied obligation on the part of the lessor that it shall be fit for the purpose for which it is taken: *Sutton* v. *Temple,* 12 Mee. & W. 52. Nor of a house that it shall be reasonably fit for habitation: *Hart* v. *Windsor,* Id. 68. Nor is it implied that it shall continue fit for the purpose for which it is demised, as the tenant

can neither maintain an action, nor is he exonerated from the payment of rent if the house is blown down or destroyed by fire, or the occupation rendered impracticable by the act of God or the king's enemies: Id. When it is agreed that the landlord shall do the repairs, there is no implied condition that the tenant may quit if the repairs are not done: *Surplice* v. *Farnsworth,* 7 Man. & Gr. 576; S. C., 49 Eng. Com. L. 574.

In *Gott* v. *Gandy,* 2 El. & Bl. 845, S. C., 75 Eng. Com. L. 843, the plaintiff brought an action against his landlord for neglecting to make substantial repairs to the premises, after notice that they were in a dangerous state, by reason of which the premises fell during the tenancy, and injured his goods. The court held that no obligation on the part of the landlord to make repairs arose from the relation of landlord and tenant. "The absence of authority to show a duty, as between landlord and tenant," marks Erle, J., "is very strong against the existence of such a duty." In the absence of any special agreement, the tenant takes the risk of the future condition of the premises leased. "The tenant," remarks Savage, C. J., in *Mumford* v. *Brown,* 6 Cow. 475 [16 Am. Dec. 440], "takes the premises for better and for worse, and cannot involve his landlord in expense for repairs without his consent."

In the present case, it does not appear that there was any agreement, when the contract of leasing was entered into, that the landlord should keep the premises in repair. If there be no stipulation between the parties to a lease on the subject of repairs, the tenant is bound to keep the premises in repair: *Long* v. *Fitzsimmons,* 1 Watts & S. 530.

The lease and its terms and conditions were made. The duties of the parties were left as at common law. The landlord was under no obligation to repair, either by express contract or by implication of law. By law, the duty to repair devolved upon the tenant. It is not in proof that the premises were out of repair when the tenant entered upon their occupation. The landlord, being under no legal obligation to make repairs, promised the tenant, who was under such obligation, to make them. The promise was without consideration. It was no part of the original agreement. It was made while the tenant was occupying the premises. The action cannot be maintained.

Exceptions overruled.

INGALLS v. HOBBS, in Mass. Sup. Jud. Ct., May 9, 1892—156 Mass. 348, 31 N. E. 286, 16 L. R. A. 51, 32 Am. St. Rep. 460, Tiedeman R. P. Cas. 126.

KNOWLTON, J. This is an action to recover $500 for the use and occupation of a furnished dwelling house at Swampscott during the summer of 1890. It was submitted to the superior court on what is entitled an "agreed statement of evidence," by which it appears that the defendant hired the premises of the plaintiffs for the season, as a furnished house, provided with beds, mattresses, matting, curtains, chairs, tables, kitchen utensils, and other articles which were ap-

parently in good condition, and that when the defendant took possession it was found to be more or less infested with bugs, so that the defendant contended that it was unfit for habitation, and for that reason gave it up, and declined to occupy it. * * * Judgment was ordered for the defendant, and the plaintiffs appealed to this court. * * *

The facts agreed warrant a finding that the house was unfit for habitation when it was hired, and we are therefore brought directly to the question whether there was an implied agreement on the part of the plaintiff that it was in a proper condition for immediate use as a dwelling house. It is well settled, both in this commonwealth and in England, that one who lets an unfurnished building to be occupied as a dwelling-house does not impliedly agree that it is fit for habitation. *Dutton* v. *Gerrish,* 9 Cush. 89; *Foster* v. *Peyser,* Id. 242; *Stevens* v. *Pierce,* 151 Mass. 207; 23 N. E. 1006; *Sutton* v. *Temple,* 12 Mees. & W. 52; *Hart* v. *Windsor, Id.* 68. In the absence of fraud or a covenant, the purchaser of real estate, or the hirer of it for a term, however short, takes it as it is, and determines for himself whether it will serve the purpose for which he wants it. He may, and often does, contemplate making extensive repairs upon it to adapt it to his wants. But there are good reasons why a different rule should apply to one who hires a furnished room, or a furnished house, for a few days, or a few weeks or months. Its fitness for immediate use of a particular kind, as indicated by its appointments, is a far more important element entering into the contract than where there is a mere lease of real estate. One who lets for a short term a house provided with all furnishings and appointments for immediate residence may be supposed to contract in reference to a well-understood purpose of the hirer to use it as a habitation. An important part of what the hirer pays for is the opportunity to enjoy it without delay, and without the expense of preparing it for use. It is very difficult, and often impossible, for one to determine on inspection whether the house and its appointments are fit for the use for which they are immediately wanted, and the doctrine *caveat emptor,* which is ordinarily applicable to a lessee of real estate, would often work injustice if applied to cases of this kind. It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at the time. This distinction between furnished and unfurnished houses in reference to the construction of contracts for letting them, when there are no express agreements about their condition, has long been recognized in England, where it is held that there is an implied contract that a furnished house let for a short time is in proper condition for immediate occupation as a dwelling. *Smith* v. *Marrable,* 11 Mees. & W. 5; *Wilson* v. *Hatton,* 2 Exch. Divi. 336; *Warehouse Co.* v. *Carr,* 5 C. P. Div. 507; *Sutton* v. *Temple, ubi supra; Hart* v. *Windsor, ubi supra; Bird* v. *Lord Greville,* 1 Cababe & E. 317; *Charsley* v. *Jones,* 53 S. P. Q. B. Div. 280. In *Dutton* v. *Gerish,* 9 Cush. 89, Chief Justice Shaw recognizes the doctrine as applicable to furnished houses; and in *Edwards* v. *McLean,*

122 N. Y. 302; 25 N. E. Rep. 483; *Smith* v. *Marrable,* and *Wilson* v. *Hutton,* cited above, are referred to with approval, although held inapplicable to the question then before the court. See *Cleves* v. *Willoughby,* 7 Hill, 83; *Franklin* v. *Brown,* 118 N. Y. 110, 23 N. E. 126. We are of opinion that in a lease of a completely furnished dwelling house for a single season at a summer watering place there is an implied agreement that the house is fit for habitation without greater preparation than one hiring it for a short time might reasonably be expected to make in appropriating it to the use for which it was designed.

Judgment affirmed.

The exception established in this case of leases of furnished houses for short terms is repudiated in an extended opinion in Murray v. Albertson (1888), 50 N. J. L. 167, 13 Atl. 394, 7 Am. St. Rep. 787, by the highest court in New Jersey; in Fisher v. Lighthall, 4 Mackey (D. C.) 82, 54 Am. Rep. 258; and doubted in the case of Franklin v. Brown (1889), 118 N. Y. 110, 23 N. E. 126, 16 Am. St. Rep. 744, 6 L. R. A. 770, and distinguished on the ground that the offensive odors which rendered that place untenantable arose off the premises in an adjoining livery stable. See also: Rubens v. Hill (1904), 213 Ill. 523, 72 N. E. 1127.

MILES v. TRACEY, in Ky. Ct. of App., Jan. 3d., 1906—28 Ky. L. Rep. 621, 89 S. W. 1128.

Plaintiff appeals from a judgment sustaining a demurrer to her petition.

O'REAR, J. Appellees, landlords, owned a two-story building, the lower story of which was let to tenants and the upper story to appellant. The building fell because structurally insecure, and damaged appellant's furniture. She sues the landlords to recover the damages. In *Franklin* v. *Tracy,* 25 Ky. L. Rep. 1409, 77 S. W. 1113, 63 L. R. A. 649, it was held that there was no implied warranty by the landlord that the tenement was fit or safe; that the tenant leases, as one buys such property, with the duty to look and take notice for himself of its condition. In this case, to avoid the effect of the opinion above cited, it is admitted, and to conform presumably to the response to the petition for a rehearing in that case (25 Ky. L. Rep. 1409, 78 S. W. 1112, 63 L. R. A. 949), appellant here amended her petition in this case, and alleged that she was tenant of the upper story alone, that the defendants had let the lower story to other tenants, and that appellees had retained and reserved control and possession of the walls and foundation of the building. The desire was to bring the allegations of this pleading up to the rule as stated by some text-writers and courts, that where the landlord lets portions of a tenement to different tenants, reserving a common entry, hallway, or stairway, which is not let to any of them, but is reserved for the use of all, he is liable for injuries occurring in such reserved portion by reason of its defective condition. This case falls short of the doctrine relied on. Although it is stated that the

landlords retained possession and control of the walls and foundation, the pleading shows the fact to be that the possession of the entire premises had been parted with. While if the landlord had reserved, for example, a stairway for the common use of all his tenants, it could not be said that any of them had exclusive control of it, or that all together had. It was then his duty to keep it in repair, not by reason of any implied covenant to that effect, but, as those using it were his licensees, he owed them the duty to keep the passageway in reasonably safe and fit condition for their use. But here there could have been in fact no reservation of possession or control. The technical averment is an ideality, and inconsistent with the essential conditions resulting from the facts alleged in the petition. It then is reduced to a legal conclusion, and does not help an otherwise defective pleading. There is no allegation that the defective condition of the building was known to the landlords, or that the defect was concealed or warranted against by them.

Judgment affirmed.

SIGGINS v. McGILL, in New Jersey Court of Err. and App., Nov. 20, 1905 —72 N. J. L. 263, 62 Atl. 411, 111 Am. St. Rep. 666.

PITNEY, J. Plaintiff was a tenant of the defendants, occupying an apartment in a building owned by them in Jersey City. There were several apartments in the building, and these were separately rented out by defendants to different families. The halls and stairways of the building were used in common by several tenants. While descending one of these stairways the plaintiff stumbled and fell, sustaining personal injuries. This action was brought to recover compensation therefor from the landlords, upon the ground that the plaintiff's fall was due to the bad condition of the stair covering.

The verdict and consequent judgment were in favor of the plaintiff. There were motions for nonsuit and for direction of a verdict in favor of defendant, both of which were denied. They were based in part upon the ground that plaintiff knew, or ought to have known, the condition of the stair covering, and either had assumed the risk or by his own negligence had contributed to his injury. These grounds were untenable, there being at least disputable questions of fact for the jury's determination with respect to the plaintiff's knowledge of the condition of the stairs and with respect to his care while using them.

The motions were based, also, upon the ground that there was no liability on the part of the landlords for the condition of the staircase. The learned trial justice, having refused the motions, submitted the case to the jury with this instruction—that since the building was occupied by several families, who had the use of the halls and stairways in common, there rested upon the defendants the duty of using reasonable care to keep the halls and stairways in proper condition for the common use of the tenants. To this instruction, as well as to the denial of the motions, exception was duly sealed.

In this state it is established as a general rule that the landlord is not liable for injuries sustained by a tenant or his family, or guests, by reason of the ruinous condition of the premises demised, there being upon the letting of a house or lands no implied contract or condition that the premises are or shall be fit and suitable for the use of the tenants. So it was held by the supreme court, in *Naumberg* v. *Young,* 44 N. J. L. 331, 43 Am. Rep. 380; *Mullen* v. *Rainear,* 45 N. J. L. 520; *Clyne* v. *Helms,* 61 N. J. L. 358, 39 Atl. 767, and *Land* v. *Fitzgerald,* 68 N. J. L. 28, 52 Atl. 229, and, by this court in *Murray* v. *Albertson,* 50 N. J. L. 167, 7 Am. St. Rep. 787, 13 Atl. 394.

But it is recognized that this rule does not apply to those portions of his property (such as passageways, stairways and the like) that are not demised to the tenant, but are retained in the possession or control of the landlord for the common use of the tenants and those having lawful occasion to visit them, the ways being used as appurtenant to the premises demised. With respect to such ways it has been held by our supreme court that the landlord is under the responsibility of a general owner of real estate who holds out an invitation to others to enter upon and use his property, and is bound to see that reasonable care is exercised to have the passageways and stairways reasonably fit and safe for the uses which he has invited others to make of them: *Gillvon* v. *Reilly,* 50 N. J. L. 26, 11 Atl. 481; *Gleason* v. *Boehm,* 58 N. J. L. 475, 34 Atl. 886, 32 L. R. A. 645. This doctrine, we think, is indubitably sound. It is in nowise opposed to the rule which exempts the landlord from liability for the condition of the premises that are demised, but is plainly distinguishable therefrom. In the case of a demise, the entry and occupancy are pursuant to an estate vested in the tenant and are exclusive of the landlord, while in the case of passageways and stairways that are retained in the legal possession of the landlord and are simply used by the tenants as appurtenances to the property demised to them, their ingress and egress are by virtue either of invitation or of necessity. This is the ground of the distinction as pointed out in *Looney* v. *McLean,* 129 Mass. 33, 37 Am. Rep. 295, cited with approval in *Gillvon* v. *Reilly,* 50 N. J. L. 26, 11 Atl. 481. In *Phillips* v. *Library Co.,* 55 N. J. L. 307, 27 Atl. 478, which was a case of one of several tenants of a building injured while using a path to the rear that was arranged for the common use of the tenants, this court affirmed the responsibility of the landlord for the condition of the path.

The judgment under review should be affirmed.

If the lessor knows of the dangerous condition of the premises and conceals it from the tenant, he is liable to the tenant for all injuries incurred therefrom. A tenant complained of the water in the well on the premises. The lessor investigated and found a dead dog in the well; but closed the well without removing the carcass, told the tenant the water was not fit to drink, but would do to wash with. The tenant's family continued to drink the water, became very sick, later discovered the facts, and removed without paying any rent. In an action for the rent these facts were pleaded as a defense, verdict found for defendant, and affirmed on appeal with

punitive damages to defendant for the vexatious appeal. Maywood v. Logan (1889), 78 Mich. 135, 43 N. W. 1052, 18 Am. St. Rep. 431.

Right to Emblements.

OLAND v. BURDWICK, in B. R., Easter, 38 Eliz.—A. D. 1597, Cro. Eliz. 460. Same case 5 Coke 416, Goldsb. 189, 190, Moor 394.

A feme holding land during widowhood sowed corn, and before harvest took baron; and in trespass by the baron against the lord of the manor for taking the corn, the question was who should have it. It was adjudged for the lord by POPHAM, C. J. and CLENCH, J.; FENNER, J., contra, and GAWDY, J., absent. CLENCH, J., said there is a difference when the estate of him who sows the land is determined by his own act, by a casualty, and when by the act of the law or by another man. And therefore in this case, if the feme had let the land, and the lessee had sown it, and afterwards the feme had taken baron, yet the lessee should have the corn. But if the determination be by the act of him who sows the land it is otherwise. * * *

Right to Estovers.

ANDERSON v. COWAN, in Iowa Sup. Ct., Oct. 20, 1904—125 Iowa, 259, 101 N. W. 92, 106 Am. St. Rep. 303.

Action by lessor to enjoin lessee for term of five years from cutting timber trees for fire wood. On hearing, the petition was dismissed and plaintiff appeals.

LADD, J. The lease contains no reference to the use of timber for firewood, but appellees insist that the right to estovers is an incident to be implied from the mere leasing of the farm, and such was undoubtedly the rule at common law: 1 Wood on Landlord and Tenant, sec. 247; 1 Taylor on Landlord and Tenant, sec. 350. See 18 Am. & Eng. Ency. of Law, 448; *Van Deusen* v. *Young*, 29 N. Y. 9; *Wright* v. *Roberts*, 22 Wis. 161; *Webster* v. *Webster*, 33 N. H. 18, 66 Am. Dec. 705. This is conceded, but it is argued that the common of estovers is so out of harmony with the spirit of our institutions that it ought not to be adopted as a part of the law of the state. That the common law obtains in this state is not questioned, and appellant has not taken the trouble to point out any differences between our situation and that of the people of England which should lead to the rejection of this particular portion of it. Many decisions, in liberally interpreting the rules relating to estovers, have given as a reason therefor the existence of more extensive forests here than in England, and the necessity of reducing the land to cultivation; but we have found none suggesting the rejection of the doctrine entirely as inimical to our institutions. In many of the states woodland is abundant, and cutting

it down by a tenant for life or for years has been allowed under circumstances which would be regarded as waste there: Tiedeman on Real Property, 69; *Proffitt* v. *Henderson,* 29 Mo. 325; 4 Kent's Commentaries, 76. Mr. Washburn, in his work on Real Property, says that: "In respect to what timber and what trees may be used for firewood, and whether the cutting of trees, though for neither of these uses, would be waste, depends upon the usages of the country, the customary mode of managing lands, and the manner in which the inheritance would be affected by such cutting, rather than the rules of the English common law; the rule here as to waste being that nothing which does not prejudice the inheritance of those who are entitled to the remainder or reversion can be deemed waste": 1 Washburn on Real Property, 128 *et seq.*

In large portions of this state there were no native forests, and in these innumerable artificial groves have been planted. In others, native timber is found in abundance, and, while not enough in any part to permit of indiscriminate destruction, we cannot say that because of local conditions the common of estover ought not to be regarded as a part of the law of the land. Estovers are of three kinds: 1 Housebote, being a sufficient supply of wood to repair and burn in the house; 2. Plowbote for making and repairing instruments of husbandry; and 3. Haybote, for repairing hedges and fences. The tenant is allowed to cut only for present use on the premises, and not elsewhere, and only on such as may be suitable for the purpose. Few, if any, houses in this state have been constructed from native timber and rarely will timber be made use of in the repairs of the house, or in the making instruments of husbandry, or in the repair of fences, save in replacing of posts. The dead and fallen timber is usually of no value save for fuel, and ordinarily the only benefit the tenant obtains from the wood lots is the fuel for his stove. Indeed, it is of little value for any other purpose. This, undoubtedly, the tenant may burn as firewood. It is said in Coke on Littleton, 53b, that, if there is sufficient dead wood for fuel, the tenant has no right to cut down growing trees for that purpose, and in *Simmons* v. *Norton,* 7 Bing. 640, it was held that in felling trees for repairs only those suitable might be taken. According to Blackstone the tenant was not permitted to cut timber trees: See Cooley's Blackstone, 122, 144. And this appears to have been the view of Coke: Coke on Littleton, 53. In *McCullough* v. *Irvine's Exrs.,* 13 Pa. St. 438, the court held that whether cutting timber will be deemed waste depends on the custom of farmers, the situation of the country, and the value of the timber. If timber trees have been planted, they are presumed to have been placed to meet the special purposes of the owner, as to serve as an ornament to his farm, or as a windbreak for his stock; and in determining whether any may be appropriated by the tenant the use of the owner designed for them is always to be kept in view. Indeed, it may be safely laid down that the main object had in planting an artificial grove is not ordinarily to raise fuel, and

that growing trees so planted may not be cut down without the owner's assent. With respect to the native forests we are inclined, because of the conditions in this state, to adhere to the common law more strictly than has been done in other jurisdictions in this country, and, unless growing trees are such as are customarily cut down for firewood, the tenant ought not to be permitted to make use of them for this purpose. In the instant case the defendants cut for fuel, besides the dead and fallen timber, a number of live trees. They were of a kind ordinarily used in that vicinity for fuel, were suitable for that purpose only, and whether their removal worked any injury to the reversion was in dispute. The witnesses were before the court, and, in view of its superior opportunities of weighing the testimony, we are not inclined to interfere with the decree.

Affirmed.

Apportionment of Rent on Destruction.

ANON, Mich., 30 Edw. I, A. D. 1302—Year Book, (Pike) 30 & 31, Edw. I, p. 476.

A man demanded arrears of a rent, &c. for a mill leased for a term of years. The defendant said that the mill was burned by the Scots &c.; and that consequently he ought not to pay the rent; and the same plaintiff brought a writ of covenant respecting the same mill, stating that the defendant ought to have left the mill at the end of the term in as good a state &c.; and the defendant gave the same answer, whereby he was bound without exception.

RICHARDS LeTAVERNER'S CASE, Trinity, 35 Hen. 8.—A. D. 1544—Dyer 56a.

A man makes a lease for years of land, and of a flock of sheep, rendering certain rent, and all the sheep died. It was asked upon indenture of Richards le Taverner, whether this rent might be apportioned. And some were of opinion that it should not, although it is the act of God, and no default in the lessee or lessor; as if the sea comes upon part of the land leased, or part is burned with wild-fire, which is the act of God, the rent is not apportionable, but the entire rent shall issue out of the remainder. Otherwise it is if part be recovered or evicted by an elder title, then it is apportionable. And of this opinion were BROMLEY, PORTMAN, HALES, sergeants, LUKE, justice, BROOKE, and several of the temple. But MARVYNE, BROWN, justices, TOWNSEND, GRIFFITH, and FOSTER, *e contra.* But all thought it was good equity and reason to apportion the rent. And afterwards this case was argued in the readings by MOORE, in the following lent. And it seemed to him and to BROOKE, HADLEY, FORTESCUE and BROWN, justices, that the rent should be apportioned, because there is no default in the lessee.

GRAVES v. BERDAN, in New York Ct. of App., 1863—26 N. Y. 498, Finch 733, Pattee 367.

Action for rent on rooms on second story which had been destroyed by fire before the rent accrued.

ROSEKRANS, J.—The opinion delivered by Justice Emott in this case, in the Supreme Court, is a correct exposition of the law applicable to it, and for the reasons stated therein, the judgment should be affirmed. The case of *Stockwell* v. *Hunter,* 11 Metc. 448, may be added to the authorities cited by Justice Emott to show that a lease of basement rooms or chambers, in a building of several stories in height, without any stipulation, by the lessor or lessee, for rebuilding, in case of fire or other casualties, gives the lessee no interest in the land upon which the building stands, and that if the whole building is destroyed by fire, the lessee's interest in the demised rooms is terminated, and the lessor may, after the destruction of the building, enter upon the soil and rebuild upon the ruins of the former edifice.

It may be added that at common law, where the interest of the lessee in a part of the demised premises was destroyed by the act of God, so that it was incapable of any beneficial enjoyment, the rent might be apportioned. In Rolle's Abridgment, 236, it is said that if the sea break in and overflow a part of the demised premises, the rent shall be apportioned, for, though the soil remains to the tenant, yet as the sea is open to every one, he has no exclusive right to fish there. A distinction is taken between an overflow of the land by the sea, and fresh water, because, though the land be covered with fresh water, the right of taking the fish is vested exclusively in the lessee, and in that case the rent will not be apportioned. In the latter case the tenant has a beneficial enjoyment, to some extent, of the demised premises, but in the former he has none, and if the use be entirely destroyed and lost, it is reasonable that the rent should be abated, because the title to the rent is founded on the presumption that the tenant can enjoy the demised premises during the term. Com. Land. and Ten. 218; Gilb. on Rents, 182.

Where the lessee takes an interest in the soil upon which a building stands, if the building is destroyed by fire, he may use the land upon which it stood, beneficially, to some extent, without the building, or he may rebuild the edifice; but where he takes no interest in the soil, as in the case of a demise of a basement, or of upper rooms in the building, he cannot enjoy the premises in any manner after the destruction of the building, nor can he rebuild the edifice. He cannot have the exclusive enjoyment of the vacant space formerly occupied by the demised rooms. The effect of the destruction of the building, in such a case, is analogous to the effect of the destruction of demised premises by the encroachments of the sea, mentioned in Rolle's Abridgment; and the established rule for the abatement or apportion-

ment of the rent should be applied in the former as well as in the latter case. The same reason exists for its application in both cases.

But even if the lessee's interest in the demised apartment, in a case like this, was not terminated by the total destruction of the building, it may be doubted whether the lessor could recover rent so long as he failed to give the demised upper rooms the support necessary to them for special enjoyment. The rule seems to be settled in England, that where a house is divided into different floors or stories, each occupied by different owners, the proprietor of the ground floor is bound, by the nature and condition of his property, without any servitude, not only to bear the weight of the upper story, but to repair his own property so that it may be able to bear such weight. The proprietor of the ground story is obliged to uphold it for the support of the upper story. *Humphrey* v. *Brogden,* 12 Q. B. 739; s. c. 1 Eng. Law and Eq. 241; *Rowbothem* v. *Wilson,* 36 Id. 236; *Harris v. Roberts,* 6 El. & Br. 643; s. c. 7 Id. 625. In the case last cited the duty of such support is recognized as a general common law right. In a lease of upper rooms by the owner of the entire building, a covenant should be implied on the part of the lessor to give such support to the upper rooms as is necessary for their beneficial enjoyment. It has been decided in this court that the statute forbidding the implication of covenants in conveyances of real estate, does not apply to leases for years. *Mayor of New York* v. *Maybee,* 3 Kern. 151; *Vernam* v. *Smith,* 15 N. Y. 332, 333.

The judgment should be affirmed. DENIO, C. J., SELDEN, BALCOM, and MERVIN, JJ., concurred.

The dissenting opinion of WRIGHT, J., concurred in by DAVIES, J., is omitted.

Liability for Waste.

STATUTE OF MARLBOROUGH, 52 Hen. III, c. 23, § 2—A. D. 1267.

Also, farmers during their terms shall not make waste, sale, nor exile, of houses, woods, men, nor of anything belonging to the tenements that they have to farm, without special license had by writing of covenant, making mention that they may do it; which thing, if they do, and thereof be convict, they shall yield full damage, and shall be punished by amercement grievously.

STATUTE OF GLOUCESTER, 6 Edw. I, c. 5—A. D. 1278.

It is provided also that a man from henceforth shall have a writ of waste in the chancery against him that holds by law of England, or otherwise for term of life, or for term of years, or a woman in dower; and he which shall be attainted of waste shall lose the thing that he has wasted, and moreover shall recompense thrice so much as the waste shall be taxed at. * * *

ANON., In Common Pleas, Mich. term, 4 Edw. II—A. D. 1310—4 Selden Society Year Books p. 136.

A writ of waste was brought against a bailiff. It was challenged and it was abated by BEREFORD [C. J.], who said: If my bailiff does waste I shall charge him upon his account, etc. So the writ was abated. Therefore, etc.

ANON., in Common Bench, 6 Eliz.—A. D. 1564.—Cases rep. by Dalison in Keilwey, p. 206, pl. 10.

In waste. Waste was assigned in a parish, in that the lessee suffered a sea wall adjoining the parish to become ruinous, whereby the land became flooded by the tide. *Carus* moved that this could not be assigned for waste, because no limit can be put to the shore, and it is as if waste should be assigned of a house destroyed by tempest. DYER (C. J.) It seems reasonable that if there should be a small breach in the bank or wall, and the tenant suffers it to continue so that later the violence of the sea destroys the whole wall and floods the land, this is waste; for the lessee might easily have prevented it in the beginning. But if it was suddenly done by the violence of the water, that might be pleaded in bar. And he said that this was a rare case, and he demanded of the clerks if they had any precedent for such an assignment, and they said no. In another action of waste the same year it was held by DYER (C. J.) and WELSH (J.), that if the lessee for years permits the banks of the sea to decay so that the adjoining land is flooded by the flowing sea, this is waste. But where it is by a storm of the sea it is otherwise, which note. * * *

And observe also, that the same year Walter Griffin brought waste, and assigned that the lessee permitted the banks of the river Trent to wash away and remain unrepaired, through which the water broke the banks and flooded the land, by his default. And it was held by all the judges that this was waste; for the Trent is not so violent but that the lessee by vigilence and industry might easily enough maintain the banks. But the violence of the sea is such that it could not by any care be restrained; so that if the sea tempestuously breaks its bounds, and floods the land, this is not waste.

COUNTESS OF SHREWSBURY'S CASE, in King's Bench, Mich. 42 & 43 Eliz.—A. D. 1600—5 Coke 13b; same case by title ALSOP v. CROMPTON, Cro. Eliz. 777, 784.

The countess of Shrewsbury brought an action on the case against Richard Crompton, a lawyer of the Temple, and declared, that she leased to him a house at will, and that he so carelessly and negligently kept his fire that the house was burned; to which the defendant pleaded not guilty, and was found guilty, &c. And it was adjudged that for this permissive waste no action lay, against the opinion of Brooke in the abridgment of the case of 48 Edw. III, 25, Waste 52. And the reason

of the judgment was because at the common law no remedy lay for waste either voluntary or permissive against a tenant for life or years, because the lessee had an interest in the land by the act of the lessor, and it was his folly to make such lease, and not restrain him by covenant, condition, or otherwise, that he should not do waste. So, and for the same reason a tenant at will shall not be punished for permissive waste. But the opinion of Littleton is good law, § 71: if lessee at will commits voluntary waste viz. in abatement of the houses, or in cutting of the woods, there a general action of trespass lies against him; for, as it is said in 2 & 3 Phil. & Mary, Dyer 122b, when a tenant at will takes upon him to do such things which none can do but the owner of the land, these amount to the determination of the will, and of his possession, and the lessor shall have a general action of trespass without any entry. * * *

As to liability on covenant to repair and return in good condition, see post, Covenants. —.

Tenant's Right to Open and Work Mines.

SAUNDERS' CASE, in the Common Pleas, Trinity Term, 41 Eliz.—A. D. 1599—5 Coke 12.

Saunders brought an action of waste against Marwood, assignee of the term in the tenements, for waste done in digging seacoals. The defendant pleaded in bar, that the first lessee, who opened the mine, granted to him all his interest in the land with all profits, excepting and reserving always to himself and his heirs all benefits and profits of the mine Anglice (the coal-mine), in the said parcel of land, and all fallen trees; and averred that the said mine was at the time of the assignment and yet is open. Whereupon the plaintiff demurred in law. And on great deliberation it was adjudged for the plaintiff: and in this case three points were resolved:

1. If a man hath land in part of which is a coal-mine open, and he leases the land to one for life or for years, the lessee may dig in it; for as much as the mine is open at the time, &c., and he leases all the land, it shall be intended that his intent is as general as his lease is, *scil.* that he shall take the profit of all the land, and by consequence of the mine in it. See 17 Edw. III, 7 a, b, John Hull's Case, accord; and so the doubt in Fitz. Nat. Brev. 149 C is well explained.

2. If the mine were not open but included within the bowels of the earth at the time of the lease made, in such case by leasing the land the lessee cannot make new mines, for that shall be waste. Fitz. Nat. Brev. 59, & 22 Hen. VI, 18b, accord.

3. If a man hath mines hid within his land, and leases his land and all mines therein, there the lessee may dig for them, for whenever anyone grants anything he is understood to grant that without which the thing itself may not be, and therewith agrees 9 Edw. IV, 8, where it is said, that if a man leases his land to another, and in the same there is a mine (which is to be intended of a hidden mine) he cannot dig for it; but if he lease the land and all mines in it, then although the mines

be hidden, the lessee may dig for them; and by consequence the digging of the mine in the principal case was waste in the first lessee.

4. It was resolved that although the mine be first opened by the first lessee, yet if his grantee dig in it, it is waste in him.

5. It was resolved that the exception was void; for, first, by the exception of the profits of the mine, or of the mine itself, the land is not excepted; and then it follows, that he hath excepted that which he could not have or take; as if a man assigns his term, and excepts the timber trees on the land or the gravel or clay within the land, it is void, for he cannot except to himself a thing which doth not belong to him by the law. And although it was said, that forasmuch as the lessee first opened the mine, and thereby committed the waste, and so had *quodam modo* appropriated it to himself and by his wrong had subjected himself to lose the place wasted and treble damages, it should be a reason that he might keep it to himself and so continue punishable for the waste of which he was the first author; but nothwithstanding that it was resolved as above, for his wrong which he committeth cannot divest the interest in the mine, being in the land demised to him out of the lessor; and therefore he cannot except that to himself which belongs to another.

* * *

ASTRAY v. BALLARD, in King's Bench, 29 Car. 2.—A. D. 1677—2 Lev. 185, 2 Jones 71. Abridged from Levinz.

Trover, not guilty pleaded, special verdict. One seised in fee of lands wherein were mines opened, by indenture leased the *lands* and *mines* therein to defendant, who opened a new coal mine and there dug the coals for which this action was brought. The question was whether the lease gave right to open new mines. It was said for the plaintiff that it did not, citing Coke Lit. 54 b, and *Liford's Case,* 11 Coke 46, For defendant it was agreed that Coke Lit. 54b is as cited; but to warrant his opinion he cites, *Saunders's Case,* 5 Coke, which does not warrant it, nor does any other book. But the COURT held, that by the words *land* and *mines,* there being mines open at the time of the demise, no mines pass but those open; and gave judgment for the plaintiff.

Termination of Relation.

LOW v. ELWELL, in Mass. Sup. Judicial Ct., Nov. Term, 1876—121 Mass. 309, 23 Am. Rep. 272.

Tort for assault in forcibly entering and ejecting plaintiff from her dwelling house. Plaintiff's husband had rented the house orally, occupied it two years, and been given notice to quit. The case comes here on agreed facts, by consent of parties without verdict. If the agreed facts justify defendant, there should be a nonsuit; otherwise, the case to stand for assessment of damages.

GRAY, C. J. A tenant holding over after the expiration of his tenancy is a mere tenant at sufferance, having no right of possession against his

landlord. If the landlord forcibly enters and expels him, the landlord may be indicted for the forcible entry. But he is not liable to an action of tort for damages either for his entry upon the premises, or for an assault in expelling the tenant, provided he uses no more force than is necessary. The tenant cannot maintain an action in the nature of trespass *quare clausum fregit,* because the title and the lawful right to the possession are in the landlord, and the tenant as against him, has no right of occupation whatever. He cannot maintain an action, in the nature of trespass to his person, for a subsequent expulsion with no more force than necessary to accomplish the purpose; because the landlord having obtained possession by an act which, though subject to be punished by the public as a breach of the peace, is not one of which the tenant has any right to complain, has, as against the tenant, the right of possession of the premises; and the landlord, not being liable to the tenant in an action of tort for the principal act of entry upon the land, cannot be liable to an action for the incidental act of expulsion, which the landlord merely because of the tenant's own unlawful resistance, has been obliged to resort to in order to make his entry effectual. To hold otherwise would enable a person, occupying land utterly without right, to keep out the lawful owner until the end of a suit by the latter to recover the possession to which he is legally entitled.

This view of the law, notwithstanding some inconsistent opinions, is in accordance with the current of recent decisions in England and in this Commonwealth.

In *Turner* v. *Meymot,* 7 Moore, 574, S. C. 1 Bing. 158, it was decided that a tenant whose term had expired could not maintain trespass against his landlord for forcibly breaking and entering the house in his absence. In *Hillary* v. *Gay,* 6 C. & P. 284, indeed, Lord Lyndhurst at *nisi prius,* while recognizing the authority of that decision, ruled that if the landlord, after the expiration of the tenancy, by force put the tenant's wife and furniture into the street, he was liable to an action of trespass *quare clausum fregit.* And in *Newton* v. *Harland,* 1 Man. & Gr. 644; S. C. 1 Scott N. R. 474; a majority of the court of common pleas, overruling decisions of Baron Parke and Baron Alderson at *nisi prius,* held that under such circumstances the landlord was liable to an action of trespass for assault and battery.

But in *Harvey* v. *Brydges,* 14 M. & W. 437, Baron Parke stated his opinion upon the point raised in *Newton* v. *Harland,* as follows: "Where a breach of the peace is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly; even though, in so doing, a breach of the peace was committed." Baron Alderson concurred, and said that he re-

tained the opinion that he expressed in *Newton* v. *Harland,* notwithstanding the decision of the majority of the court of common pleas to the contrary. The opinion thus deliberately adhered to and positively declared by those two eminent judges, though not required by the adjudication in *Harvey* v. *Brydges,* is of much weight. In *Davis* v. *Barrell,* 10 C. B. 821, 825, Mr. Justice Cresswell said, that the doctrine of *Newton* v. *Harland* had been very much questioned. And it was finally overruled in *Blades* v. *Higgs,* 10 C. B. (N. S.) 713, where, in an action for an assault by forcibly taking the defendant's property from the plaintiff's hands, using no more force than was necessary, Chief Justice Erle, delivering the unanimous judgment of the court, approved the statement of Baron Parke, above quoted, and added: "In our opinion, all that is so said of the right of property in land applies in principle to a right of property in a chattel, and supports the present justification. If the owner was compellable by law to seek redress by action for a violation of his right of property, the remedy would be often worse than the mischief, and the law would aggravate the injury, instead of redressing it. See also *Lows* v. *Telford,* 1 App. Cas. 414, 426.

In *Commonwealth* v. *Haley,* 4 Allen, 318, the case was upon an indictment for forcible entry, and no opinion was required or expressed as to the landlord's liability to a civil action.

The judgment in *Sampson* v. *Henry,* 11 Pick. 379, turned upon a question of pleading. The declaration, which was in trespass for an assault and battery (alleged that the defendant assaulted the plaintiff, and with a deadly weapon struck him many heavy and dangerous blows. The pleas of justification merely averred that the defendant was seised and had the right of possession of a dwelling house, that the plaintiff was unlawfully in possession thereof and forcibly opposed the defendant's entry, and that the defendant used no more force than was necessary to enable him to enter and to overcome the plaintiff's resistance; but did not deny the use of the dangerous weapon and the degree of violence alleged in the declaration; and were therefore held bad, in accordance with *Gregory* v. *Hill,* 8 T. R. 299, there cited. The remarks of Mr. Justice Wilde, denying the right of a party dispossessed to recover possession by force and by a breach of the peace, would, if construed by themselves, and extended beyond the case before him, allow the tenant to maintain an action of trespass against the landlord for entering the dwelling-house, in direct opposition to the judgment delivered by the same learned judge, in another case, between the same parties, argued at the same term and decided a year after. *Sampson* v. *Henry,* 13 Pick. 36.

In the latter case, which was an action for breaking and entering the plaintiff's close, and for an assault and battery upon him, the court held the plea of *liberum tenementum* was a good justification of the charge of breaking and entering the house, but not of the personal assault and battery. That decision, so far as it held that the landlord was not liable to an action of trespass *quare clausum fregit* by a tenant at sufferance for a forcible entry, has been repeatedly affirmed. *Meader* v. *Stone,* 7 Met. 147;

Miner v. *Stevens,* 1 Cush. 482, 485; *Mason* v. *Holt,* 1 Allen 45; *Curtis* v. *Galvin,* 1 Allen 215; *Moore* v. *Mason,* 1 Allen 406. And, so far as it allowed the plaintiff to recover, in such an action, damages for the incidental injury to him or to his personal property, it has been overruled. *Eames* v. *Prentice,* 8 Cush. 337; *Curtis* v. *Galvin, ubi supra.*

It has also been adjudged that a landlord, who, having peaceably entered after the termination of the tenancy, proceeds, against the tenant's opposition, to take out the windows of the house, or to forcibly eject the tenant, is not liable to an action for an assault, if he uses no more force than is necessary for the purpose. *Mugford* v. *Richardson,* 6 Allen, 76; *Winter* v. *Stevens,* 9 Allen, 526. For the reasons already stated, we are all of opinion that a person who has ceased to be a tenant, or to have any lawful occupancy, has no greater right of action when the force exerted against his person is contemporaneous with the landlord's forcible entry upon the premises.

Our conclusion is supported by the American cases of the greatest weight. *Jackson* v. *Farmer,* 9 Wend. 201; *Overdeer* v. *Lewis,* 1 W. & S. 90; *Kellam* v. *Janson,* 17 Penn. St. 467; *Stearns* v. *Sampson,* 59 Maine, 568; *Sterling* v. *Warden,* 51 N. H. 217. The opposing decisions are so critically and satisfactorily examined in an elaborate article upon this subject in 4 Am. Law Rev. 429, that it would be superfluous to refer to them particularly.

The tenancy of the plaintiff's husband under an oral lease was but a tenancy at will, which by the written lease from his landlord to the defendant, and reasonable notice thereof was determined, and he became a mere tenant at sufferance. *Pratt* v. *Farrar,* 10 Allen, 519. It being admitted that, if the defendants had the right to remove the plaintiffs by force, no more force was used than was reasonably necessary, this action cannot be maintained. *Plaintiff nonsuit.*

This decision has been approved and followed in later cases in Massachusetts and a few other states, denying actions of trespass and assault and battery by the tenant holding over against the person making the forcible eviction without process: Lambert v. Robinson, 162 Mass. 34, 37 N. E. 753, 44 Am. St. Rep. 326; Manning v. Brown, 47 Md. 506; Sterling v. Warden, 51 N. H. 217; Allen v. Keily, 17 R. I. 731, 24 Atl. 776, 17 L. R. A. 798, 33 Am. St. Rep. 905; Johnson v. Hannahan, 1 Strobh L. (S. Car.) 313 (a mere intruder); Beecher v. Parmlee, 9 Vt. 352, 31 Am. Dec. 633 (a mere intruder).

But in the supreme court of the United States and in a number of the states it has been held that a person entitled to the possession of land or buildings is liable for nominal damages at least in an action of trespass by the person forcibly evicted while holding peaceably without right, for the injury to his person and goods, but not for the loss of the premises in which he had no right; and it has also been held that the jury may award exemplary damages: Denver & R. G. Ry. Co. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286; Fox v. Brissac, 15 Cal. 223; Larkin v. Avery, 23 Conn. 304; Entelman v. Hagood, 95 Ga. 390, 22 S. E. 545; Jasper v. Purnell, 67 Ill. 358; Whitney v. Brown, 75 Kan. 678, 90 Pac. 277; Brock v. Berry, 31 Me. 293; Krevet v. Meyer, 24 Mo. 107; Thiel v. Bulls Ferry Land Co., 58 N. J. L. 212, 33 Atl. 281; Bristor v. Burr, 120 N. Y. 427, 24 N. E. 937, 8 L. R. A. 710; Mosseller v. Deaver, 106 N. Car. 494, 11 S. E. 529, 8 L. R. A. 537 and note,

19 Am. St. Rep. 540; Sperry v. Seidel, 218 Pa. 16, 66 Atl. 853; Dustin v. Cowdry, 23 Vt. 631.

TENANTS AT WILL.

Tenant at Will Defined.

LITTLETON'S TENURES, Sec. 68 (Littleton died A. D. 1482.)

Tenant at will is where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he has no certain nor sure estate, for the lessor may put him out at what time it pleases him. Yet if the lessee sows the land, and the lessor, after it is sown and before the corn is ripe, put him out, yet the lessee shall have the corn, and shall have free entry, egress, and regress to cut and carry away the corn, because he knew not at what time the lessor would enter upon him. Otherwise it is if tenant for years, who knows the end of his term, sows the land, and his term ends before the corn is ripe. In this case the lessor, or he in reversion, shall have the corn, because the lessee knew the certainty of his term and when it would end.

Same § 70. Also if a man make a deed of feoffment to another of certain lands, and deliver to him the deed, but not livery of seisin; in this case he to whom the deed is made may enter into the land and hold and occupy it at the will of him who made the deed, because it is proved by the words of the deed that it is his will that the other should have the land. But he who made the deed may put him out when it pleaseth him.

COKE LIT. 55a.—A. D. 1620?

It is regularly true that every lease at will must in law be at the will of both parties; and therefore when the lease is made to have and to hold at the will of the lessor, the law implyeth it to be at the will of the lessee also; for it cannot be only at the will of the lessor, but it must be at the will of the lessee also. And so it is when the lease is made to have and to hold at the will of the lessee, this must be also at the will of the lessor. And so are all the books that seem *prima facie* to differ clearly reconciled.

ANON., in Common Bench, Trinity, 20 Hen. 7.—A. D. 1505.—Keilwey 65a.

In debt the plaintiff counted on his lease to the defendant to have at the will of the lessor, rendering annually 20 s., and so from year to year at the will of the lessor, and for so much arrear at such a day action accrued to the plaintiff, for the sum demanded. On which came *Yaxley* for the defendant, and said that after the lease and before the day, to-wit, at such a day and place, the defendant came to the plaintiff

and declared that he did not wish longer to occupy the land, after which notice the rent was arrear. The case was argued by all the bar and by all the bench for this doubt, viz. whether the lessee in such case should be tenant at the will of the lessor or at the will of the lessee, or at the will of both.

FROWIKE, [C. J.]. Sir, it seems to me that it is not at the will of either, for then we would have a tenant at liberty to terminate his estate at his own will, and so tenant at his own will, which is not reason, for he did not receive his estate in that manner, but he took his estate to hold at the will of the plaintiff. And so it seems to me he should be held a tenant at the will of the lessor. And on the other hand, to adjudge his estate merely at the will of the lessor would be to create a perpetuity if the lessor pleased, which is unreasonable. But this will of the lessor must have a reasonable construction, and should be in this form, to-wit, if he (lessee) entered and occupied till a rent day is passed he remains all such year a tenant by the year, so his entry shall charge him, for in an action of debt against a tenant at will it is proper for the plaintiff to allege in his declaration that the defendant had entered and occupied by virtue of the lease, and this entry is traversable. But in such declaration against the tenant for years his entry is not traversable, for he is chargeable without entry, and so a diversity.

But yet the lessee may discharge himself reasonably, and this is as the year is ended; when he may determine his estate at his pleasure if he give up the occupation, but if he enter the commencement of the second year he has charged himself, and become tenant for all that year, and so on indefinitely. But the lessor is still at liberty to oust him; for he made his lease with these words, and also the tenant is not thus prejudiced, for else if he hold till the last day of the year and then the lessor oust him he has all his occupation to his own advantage. But on the part of the lessor, if the lessee after he had discharged himself one or two days before the end of the year, from this it follows that he takes the advantage of all the year, and discharges himself of payment of his rent by his own act, which is contrary to reason and against the custom of the realm; for by such means, if this were the law, no tenant at will in England could be compelled to pay his rent but at his own pleasure.

* * * And it was adjourned.

ANON., in Common Bench, Mich., 3 Hen. 8.—A. D. 1512.—Keilwey 162b.

A lease was made to one R. H. to have to him at his own will, and it was held by all the justices of the common bench, that it should be held at the will of either the lessor or lessee; for if it should be at the will of the lessee he might will to have it for life; and then it would be a freehold in him, which may in no way pass without livery, for it is a principle of law that no man shall have a freehold without livery or what is equivalent thereto, as livery within the ville or where the king by

matter of record gives land by his letters patent. And, sir, if land is leased at the will of the lessor, yet the lessee may notify his lessor that he does not will longer to occupy the land; and so though he had the land at the will of his lessor it is in law at the will of both. This matter is discussed in 35 Hen. 6, & 18 Hen. 6. * * *

Estates at Will—How Determined.

HENSTEAD'S CASE, in Common Pleas, Mich., Term, 36 & 37 Eliz.—A. D. 1595, 5 Coke 10.

A woman, tenant for life of a house and certain land in Shoram in Kent, made a lease at will rendering rent and afterwards took husband and she and her husband brought an action of debt for arrearages after the marriage; and if the lease at will were determined by the intermarriage or not was the question.

And it was agreed by the whole court, that the will was not determined by the intermarriage; for although the woman had by marrying submitted herself to the will of her husband as her head, yet forasmuch as it might be prejudicial to the husband to have the lease determined for then he would lose the rent to be paid the next day after the marriage, and it could not be in any manner prejudicial to the wife if the lease continue but rather to her benefit. And generally it might be great prejudice to all husbands who intermarry with women who have tenants at will, for the losing of their rents. For these causes it was resolved, that without express matter done by the husband after the marriage to determine the will, it is not determined.

The same is the law if a lease be made to a woman at will and she marries; the will continues notwithstanding the marriage. So if a lease be made to three, rendering rent, and one dies, it is no determination of the will; and although nothing can survive, yet because every joint-tenant is possessed *per my & per tout*, they shall be charged with the whole rent; and so the *quaere* in 10 Eliz. Dyer 269 b (pl. 20) well resolved. But in the case at bar, after the marriage the woman herself could not countermand or determine the lease at will, no more than where she and her husband make a lease at will rendering rent during the coverture, or if the lease be made to them at will; for she hath submitted herself and all her will to her husband. And so a feme covert may have a tenant at will and be tenant at will, and yet she herself cannot countermand it; because she by her intermarriage hath put her countermanding power in this case (which doth not concern freeholds or inheritance) into her husband's mouth. Also if the husband and wife lease land at will rendering rent and the husband dies, it is no countermand of the will, but the lease continues. So it was said if two joint tenants make a lease at will rendering rent and one dies, all survives to the other and if the lessee continues his possession the survivor shall have an action for the whole rent for the privity, and it shall not be countermanded for the one moiety for the mischief which might ensue to lessors,

and the rather because no mischief or prejudice can come to the lessees in such case.

SHAW v. BARBER, in Common Bench, Easter, 43 Eliz.—A. D. 1601.—Cro. Eliz. 830.

In *ejectione firmæ,* upon evidence it was agreed *per totam curiam,* and so delivered for law to the jury, that if a tenant at will make a lease for years, and the lessee enters, he is only the disseisor: and a release or confirmation to the tenant at will afterwards is void, because the privity is determined. WALMSLEY, J., said that so it had been resolved, against the opinion in 12 Edw. 4, pl. 12.

LEIGHTON v. THEED, in King's Bench, Hilary 13 Wm. 3, 1701—2 Salk. 413, s. c. 1 L. Raym. 707.

If H holds lands at will, rendering rent quarterly, the lessor may determine his will when he pleases; but if he determines it within a quarter, he shall lose the rent which should [*414] have been paid for that quarter in which he determines it. So the lessee may determine it when he pleases, but then he must pay the quarter's rent. Per HOLT, C. J.

PARKER d. WALKER v. CONSTABLE, in King's Bench, Mich. 10 Geo. 3. —A. D. 1769.—3 Wils. 25. 3 Gray Cas. 412.

Per WILMOT, C. J., and *totam curiam:* It has not been doubted of late years (and it was now resolved in this case), that half a year's notice to quit possession must be given to a tenant at will; before the end of which time an ejectment will not lie to turn him out of the farm. In a case of the demise of *Tasker* v. *Burr,* the same point was resolved by the court of B. R.; and per *Leigh,* sergeant, in Easter term, 6 or 7 Geo. 3, the same law was held in the case of an executor of a tenant at will. In the case at bar, the plaintiff, having been nonsuited for want of giving such half year's notice to defendant Constable (a tenant at will) to quit the premises, moved to set aside the non-suit; and on showing cause, the rule to set aside non-suit was discharged for the reason above in ejectment, for lands in Surrey.

RIGHT d. FLOWER v. DARBY, in King's Bench, Easter Term, 26 Geo. III.—A. D. 1786.—1 Term 159.

In ejectment it was found by special verdict that May 11, 1781, defendant Darby leased the premises, a house in Salisbury, and occupied them as a public house from that time under a parol lease at a rent of ten pounds yearly, the rent to commence from midsummer following; that he let part of the premises to defendant; and that March 26, 1785, defendant Darby was served with notice to quit on Sept. 29 following. On case reserved for the opinion of this court the question was whether the plaintiff was entitled to recover.

LORD MANSFIELD, C. J.: When a lease is determinable on a certain

event, or at a particular period, no notice to quit is necessary, because both parties are equally apprised of the determination of the term.

If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year. But then it is necessary for the sake of convenience, that, if either party should be inclined to change his mind, he should give the other half a year's notice before the expiration of the next or any following year: now this is a notice to quit in the middle of the year, and therefore not binding, as it is contrary to the agreement.

As to the case of lodgings, that depends on a particular contract, and is an exception to the general rule. The agreement between the parties may be for a month or less time, and there to be sure, much shorter notice would be sufficient, where the tenant has held over the time agreed upon, than in the other case. The whole question depends upon the nature of the first contract.

ASHHURST, J.—There is no distinction in reason between houses and lands, as to the time of giving notice to quit. It is necessary that both should be governed by one rule. There may be cases, where the same hardship would be felt in determining that the rule did not extend to houses as well as lands; as in the case of a lodging house in London, being let to a tenant at *Lady-day* to hold as in the present case: if the landlord should give notice to quit at *Michaelmas,* he would by that means deprive the lessee of the most beneficial part of the term, since it is notorious that the winter is by far the most profitable season of the year for those who let lodgings.

BULLER, J.— It is taken for granted by the counsel for the plaintiff, that the rule of law which construes what was formerly a tenancy at will of lands into a tenancy from year to year, does not apply to the case of houses; but there is no ground for that distinction. The reason of it is, that the agreement is a letting for a year at an annual rent; then if the parties consent to go on after that time, it is a letting from year to year. This reason extends equally to the present case; an annual rent is here reserved; and upon such a holding it has been determined that half a year's notice to quit is necessary. This doctrine was laid down as early as in the reign of Henry VIII (13 H. 8, 15 b). The moment the year began, the defendant had a right to hold to the end of that year: therefore there should have been half a year's notice to quit before the end of the term. This gives rise to another objection in this case, upon the distinction between six months and half a year. The case in the year-books requires half a year's notice; but here there is less than half a year's notice, and therefore it is bad on that ground also.

Judgment for the defendant.

TENANCY FROM YEAR TO YEAR.

LAYTON v. FIELD, in King's Bench, Hilary 13 Wm. 3.—A. D. 1701.—3 Salk. 222.

Per HOLT, C. J. Where a lease is made at will, the lessee, after a quarter of a year is commenced, may determine his will, but then he must pay that quarter's rent; and if the lessor determine his will after the commencement of a quarter, he shall lose his rent for that quarter. But if a lease be made from year to year, *quamdui ambabus partibus, placuerit;* in such case, after a year is commenced, neither the lessor nor the lessee can determine their wills for that year, because they have willed the estate certain for so long a time.

DOE d. RIGGE v. BELL, in K. B., Mich. 34 Geo. 3.—A. D. 1794.—5 Term 471, 2 Smith Lead. Cas. *72, 3 Gray Cas. 416.

Ejectment. At the trial it appeared that the agent for the lessor of the plaintiff let the farm in question to defendants, for seven years, by parol. Defendant entered accordingly and paid rent. Afterwards notice to quit on Lady-day was served Sept. 22d, 1792. Plaintiff being nonsuited, obtained a rule on defendant to show cause why the nonsuit should not be set aside.

KENYON, C. J. Though the agreement be void by the Statute of Frauds as to the duration of the lease, it must regulate the terms on which the tenancy subsists in other respects, as to the rent, the time of year when the tenant is to quit, &c. So where a tenant holds over after the expiration of his term, without having entered into any new contract, he holds upon the former terms. Now, in this case, it was agreed that the defendant should quit at Candlemas; and though the agreement is void as to the number of years for which the defendant was to hold, if the lessor chose to determine the tenancy before the expiration of the seven years, he can only put an end to it at Candlemas. Rule discharged.

CLAYTON v. BLAKEY, in K. B., Mich. 39 Geo. 3.—A. D. 1799.—8 Term 3, 2 Smith's Lead. Cas. 74, 3 Gray Cas. 417.

This was an action against a tenant to recover double rent, for holding over after the term ended, and after regular notice to quit. One count of the declaration stated a holding under a certain term; and the others, a holding from year to year. At the trial it appeared that defendant had held two years under a parol lease for twenty-one years. It was claimed that there was a variance, because the Statute of Frauds declared such leases should operate only to create a tenancy at will. ROOKE, J., instructed the jury that it amounted to a tenancy from year to year. *Wood* now moved to set aside the verdict, on the ground of a misdirection.

KENYON, C. J. The direction was right, for such a holding now operates as a tenancy from year to year. The meaning of the statute was,

that such an agreement should not operate as a term; but what was then considered as a tenancy at will has since been very properly construed to enure as a tenancy from year to year.

Rule refused.

COUDERT v. COHN, in New York Ct. of App., Jan. 14, 1890—118 N. Y. 309, 23 N. E. 298, 16 Am. St. Rep. 761, 7 L. R. A. 69, Finch 780.

BRADLEY, J.: The action was brought to recover rent of premises described in a written lease made by the agent of the plaintiff's intestate to the defendants in January, 1884, for the term of two years and five months, commencing on the first day of March, 1884, and ending on the first day of August, 1886, at the yearly rent of $3,000, payable in equal monthly payments, on the last business day of each month. The authority of the agent to make the lease not being in writing, it was void. 2 R. S. 134, § 6. The defendants went into possession on the first of March, 1884, and continued to occupy and pay rent up to August, 1885, when they left the premises and sought to surrender the possession up to the plaintiff's intestate, who declined to accept it. He recovered for the amount of rent at the rate mentioned in the lease from the first of August to the first of March following. While the cases are not entirely in harmony on the subject, the doctrine now in this state is such that the defendants on going into possession of the premises and paying rent, became, by reason of the invalidity of the demise, tenants from year to year, and in such case the continuance of occupancy into the second year rendered them chargeable with the rent until its close. They could then only terminate their tenancy at the end of the current year. *Reeder* v. *Sayre,* 70 N. Y. 180, 26 Am. Rep. 567; *Laughran* v. *Smith,* 75 N. Y. 205.

The question presented is: When did the rental year arising out of such relation commence and terminate? It is contended by the defendants' counsel that inasmuch as the end of the term designated by the terms of the lease was the first of August, 1886, that was the time when the yearly tenancy in contemplation of law terminated, and, therefore, the surrender was properly made on the first of August, 1885. It is urged that this view is in harmony with the recognized principle that, although the lease was invalid, the agreement contained in it regulated the terms of the tenancy in all respects, except as to the duration of the term, and *Doe* v. *Bell,* 5 D. & E. 471, [*ante*] is cited * * * That case has in several instances been cited by the courts of this state upon the question of the force remaining in the terms of the agreement embraced in a void lease. And in *Schuyler* v. *Leggett,* 2 Cow. 663, it was remarked by Chief Justice Savage, in citing it, that such an agreement "must regulate the terms on which the tenancy subsists in other respects; as the rent, the time of year when the tenant must quit, etc." And the citation was repeated to the same effect by the chief justice in *People* v. *Rickert,* 8 Cow. 230.

The question here did not arise in either of those two cases, nor can

they be treated as authority that the time for termination of a tenancy from year to year, in any year other than that of the designated expiration of term, is governed by such designation in a void lease for more than one year rather than by the time of entry. The effect sought to be given in the present case to the case of *Doe* v. *Bell* is not supported by English authority. In *Berrey* v. *Lindley,* 3 M. & G. 496, the tenant entered into possession of premises under an agreement void by the statute of frauds, by the terms of which he was to hold five years and a half from Michaelmas. Several years after his entry, and after expiration of the period mentioned in the agreement, the lessee gave notice to his landlord to terminate the tenancy at Michaelmas. It was there contended on the part of the latter, and *Doe* v. *Bell* was cited in support of the proposition, that the time designated in the agreement for the termination of the tenancy governed in that respect. But the court decided otherwise, and held that the notice was effectual to terminate the tenancy. The views of the court there were to the effect, that, although the tenancy was from year to year, the tenant might without notice have quit at the expiration of the period contemplated in the agreement, but having remained in possession and paid rent subsequently to that time, he must be considered a tenant from year to year with reference to the time of the original entry. The same principle in respect to holding over a term was announced in *Doe* v. *Dobell,* 1 A. & E. (N. R.) 806, where it was said that "in all cases the current year refers to the time of entry unless the parties stipulate to the contrary."

The doctrine of the English cases seems to be that a party entering under a lease, void by the statute of frauds, for a term, as expressed in it, of more than one year, and paying rent, is treated as a tenant from year to year from the time of his entry, subject only to the right to terminate the tenancy without notice at the end of the specified term. And to that extent and for that purpose only, the terms of agreement, in such case, regulate the time to quit. This right is held to be reciprocal. *Doe* v. *Stratton,* 4 Bing. 446. That proposition is not without sensible reason for its support. The lease, for more than one year, unless made in the manner provided by the statute, cannot be effectual to vest the term in the lessee, yet in other respects the rights of the parties may be terminated by its terms, so far as they are consistent with its failure, to create any estate or interest in the land or any duration of term for occupancy by the lessee. And that principle is properly applicable to such leases. *Porter* v. *Bleiler,* 17 Barb. 154; *Reeder* v. *Sayre,* 70 N. Y. 184, 26 Am. Rep. 567; *Laughran* v. *Smith,* 75 N. Y. 205, 209.

This view does not aid the defendants. They became tenants from year to year as from the time of their entry; and although by virtue of the terms of the agreement, in that respect, in the lease, they may have been at liberty to quit on the first of August, 1886, if they had remained until then, such time in that, or the year previous, could not be treated as the end of any year of the tenancy. The defendants having entered upon the second year from the time of the original entry, it was not

within their power to terminate their relation or liability as tenants until the end of the then current year, which did not terminate until the first day of March, was reached. * * *

Judgment affirmed.

ARBENZ v. EXLEY, in W. Va. Sup. Ct. App., April 25, 1905, 57 W. Va. 580, 50 S. E. 813, 4 A. & E. An. Cas. 625.

BRANNON, P. John Arbenz, Sr., made a written lease, but not under seal, to Exley, Watkins & Co., leasing for a term of five years and three months a brick building, including the vacant parts of certain lots, in the city of Wheeling—the term commencing January 1, 1896, and ending March 31, 1902—for the annual rent of $700, commencing April 1, 1896, payable in monthly installments. The lessees took possession on the first week of January, and occupied the premises, paying rent monthly. On September 15, 1898, a fire totally destroyed said building. The lessees paid rent for that September, and also for October, but with the rent of October sent a letter, October 31, 1898, to Arbenz, informing him that they "hereby" vacate the premises, and surrender them to him. In November, 1898, Arbenz sued out a distress warrant against said lessees for rent from November 1, 1898, to October 31, 1899, and, the same having been levied, a forthcoming bond was given, and in the proceedings upon it in the circuit court of Ohio county a verdict was rendered for the plaintiff for $502.54, after deducting for failure to repair an engine, and judgment given thereon, and the defendants took a writ of error. The defendants filed a plea denying grounds of attachment, and denying all liability for the rent claimed. The judgment below was affirmed by this court. Those matters will appear in 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957. On August 1, 1903, Arbenz brought assumpsit against Exley, Watkins & Co. to recover rent accruing later than that recovered in the proceeding above mentioned (to recover rent for the period beginning November 1, 1899, and ending December 31, 1902, a period of 38 months, at $700 per year), and the suit resulted in a verdict for only $148.15 (that is, for the 2 months of November and December, 1899; the court holding that no recovery could be had after the current year ending that date, on the theory that the tenancy from year to year then closed).

The theory against the right to recover is that a few days after the fire defendants wrote Arbenz the following letter:

"Oct. 31st, 1898. Mr. John Arbenz, City—Dear Sir: We beg to advise that we have vacated the premises known as west building on 20th street, destroyed by fire Sept. 15th, last, and hereby surrender possession of same. Yours truly, Exley, Watkins & Co."

On the former writ of error we held that, for want of seal to the lease, the term of years named in it was not created, but that it created an estate from year to year, and that said letter did not operate as a notice

to quit—to end the tenancy—so as to preclude recovery of rent up to November 1, 1899, the rent in litigation in the former proceeding. We did not go further, as no later rent was involved in that case. The question presented in the second suit is, did the tenancy end December 31, 1899? Did that letter close the tenancy and stop the rent at that date—the close of the current year 1899? For the defendants the contention is that the letter, accompanied by actual vacation of the premises and coupled with the fact that in the circuit court in April, 1899, Exley, Watkins & Co. made defense in the former proceeding, denying liability for rent, operated as a notice to quit, and closed the tenancy December 31, 1899. Take the letter. The question rests mainly on it. It states the facts that the lessees had vacated, and then surrendered possession. It does not notify that at the end of a current year in future the tenant would quit, but states present acts or past vacation and surrender. The common law, for centuries, has required, in order that lessor or lessee, under a tenancy from year to year, may close the tenancy of his own motion, that a notice to quit should be given six months before the end of the current year. That period or time of notice must be prior to the close of a year. Code 1899, c. 93, § 5, provides that "a tenancy from year to year may be terminated by either party giving notice in writing to the other, prior to the end of any year, for three months, of his intention to terminate the same." That provision recognizes as still continuing the common-law estate of tenancy from year to year, and the process of terminating it by notice to quit, and changed it only in requiring written notice and fixing a shorter time of notice. Hence it seems that we must appeal to the common law and its mode of notice to test the efficiency of the letter as notice to quit. It does not notify of a future act of quitting, but relies on past vacation and present surrender of possession for the effect of the letter. It does not name a day or time in the future when the tenancy is to end. The profession has always regarded this as a requisite in a notice to quit, I think. 2 Taylor, Landlord & Ten. § 476, says: "Form of. The notice may be given to quit on a particular day, or, in general terms, at the end of the current year of the tenancy, which will expire next after the service of the notice, or in one month after the next rent day. The latter form of expression is generally used where the landlord is ignorant of the period when the tenancy commenced, and it is preferable even when the commencement of the tenancy is known, as it provides against any misapprehension of the exact day when the tenant entered." 1 Washburn, Real Prop. § 810, says: "Notice The Time. Whether a longer or shorter time of notice is required, it must, in order to be binding, clearly indicate the time when the tenancy is to expire, and, of course, must be given a sufficient number of days before the time so indicated." The particular question before us is whether that letter is bad as a notice to quit because (1) it is a quitting at its date, not notice of a future quitting at the end of a year; and (2) because it fails to state a time for quitting.

Under the above and many other authorities, we are driven to say that it did not end the tenancy at any time. *Currier* v. *Barker,* 2 Gray, 224; *Steward* v. *Harding,* Id. 335; *Hanchet* v. *Whitney,* 1 Vt. 311; *Hunter* v. *Frost,* 47 Minn. 1, 49 N. W. 327; *Grace* v. *Michaud,* 50 Minn. 139, 52 N. W. 390; *People* v. *Gedney,* 15 Hun, 475; *Prescott* v. *Elm,* 7 Cush. 346; *Phœnixville* v. *Walters,* 147 Pa. 501, 23 Atl. 776; *Berner* v. *Gebhardt,* 87 Mo. App. 409; *Huntington* v. *Parkhurst,* 87 Mich. 38, 49 N. W. 597, 24 Am. St. Rep. 146; *Finklestein* v. *Herson,* 55 N. J. Law, 217, 26 Atl. 688; *Walters* v. *Williamson,* 59 N. J. Law, 337, 36 Atl. 665; *Godard's Ex'rs* v. *S. Carolina Railroad,* 2 Rich. Law (S. C.) 346; *Huyser* v. *Chase,* 13 Mich. 98; *Rollins* v. *Moody,* 72 Me. 135. The text-book writers seem to so regard the law. I have quoted from some above. Tiedeman on Real Estate, § 218, says that: "The notice must not only be given for a certain length of time before the estate is to end, but the estate can only be determined at the expiration of the time during which the tenant may lawfully hold: *i. e.,* at the end of the rental period. It can only be determined at the end of the year, quarter, or month, according as the tenancy is respectively a yearly, quarterly, or monthly tenancy. The notice must be sufficiently clear in its terms as to the time when the tenancy is to expire." 3 Minor's Inst. pt. 1, p. 241. "The notice * * * must end with the period at which the tenancy commences." 2 Kerr, R. Prop. 1310. 1 Lomax, Dig. 164; 1 Greenleaf's Cruise, R. Prop. p. 248, § 26. Chitty on Contracts (11th Ed.) 485, speaking of English common law, says, "The notice must be framed with reasonable certainty as to the time of quitting." In *Currier* v. *Barker,* 2 Gray, 227, it was held that a present demand or notice to quit was insufficient, and the rule is stated as follows: "The notice to quit is technical, and is well understood. It fixes a time at which a tenant is bound to quit, and the landlord has a right to enter at a time which the rent terminates. The rights of both parties are fixed by it and are dependent on it. Should the landlord decline to enter, and the tenant quit according to notice, the tenant could no longer be holden for rent, although he had given no notice to the landlord. The lease is determined by such notice properly given by either party. It is manifest, therefore, that, when such consequences depend upon the notice to be given, the notice should fix with reasonable exactness the time at which these consequences may begin to take effect. See, also, *Walker* v. *Sharpe,* 14 Allen, 45." Of course, much force is to be given to the harmonious construction of the many cases by the text-writers. Still I have had a question whether the cases mean only that the period of time before the termination must expire on the day of the close of the year, or that the notice must designate the time when the tenant intends to quit. Such seems to be the law. The only question is, does it fit this case?

It does seem of great force to say that the only object of notice is to manifest an intent of one party to end the tenancy, and to inform the other party of that intent, and that the letter in this case did that.

Arbenz surely knew that his tenants designed to end the tenancy, because he knew that they had quit the premises and surrendered possession. What more could formal notice do? True, it could not go to end the tenancy December 31, 1898, because from the letter to that date was not three months. But could it not end the tenancy at close of 1899? Now, if the tenants had on the date of the letter given notice that they would quit December 31, 1899, who would say that it would not be sufficient? Did not that letter disclose intent to quit? By law it could not operate to close the tenancy December 31, 1898, because the time would be too short. Would it not operate then as soon as the law would let it, just as a formal notice at the date of the letter would have done; that is, December 31, 1899? Arbenz had notice of his tenants' intention to quit. Why could not that notice operate at the earliest date the law would allow it to operate? In addition, if anything more could in reason be demanded to disclose the intention of the tenants to stop the tenancy, and to inform Arbenz of such intention we add that the tenants in April, 1899, in court, defended the claim of Arbenz to rent prior to November, 1899. Their defense was that the building was destroyed, and they had sent that letter and abandoned possession. But here comes in the answer that the statute, reiterating common law prevalent for centuries, tells how the tenant must end his tenancy; that is, by written notice. It is dangerous for us to insert an exception by saying that, if the landlord had knowledge of the tenant's intention, it stands for notice. It may not be improper to say that I have given labored investigation of this case, as other members of the court have, and I have been impressed with the weight of the line of defense just stated, and have struggled to find a justification for adopting it, as the payment of the whole rent by the defendants, without any return, works a hardship, which all the members of the court appreciate; but I am compelled to say that to decide against the plaintiff would be to fly in the face of practically a unanimity of authorities through several hundred years in all quarters where the common law rules. As applied generally, the rule is right. As applied in this case, it works hardship. But we cannot bend a fixed rule to suit a hard case.

Counsel says that the statute only requires three months' notice before end of year, and that the written notice need not specify time of quitting, and that to say so is to read such a requirement into the statute. We answer that the statute only recognizes as the law already the requirement of notice to terminate a tenancy from year to year, and it has not changed the common-law requisites of the notice. We have cited to us the Georgia case of *Robertson* v. *Simons,* 34 S. E. 604, in which the opinion says that while mere abandonment of premises at the end of the year "might perhaps" be sufficient to bring home notice to the landlord of the tenant's intention to terminate the tenancy, "so as to prevent the landlord recovering rent beyond the year immediately succeeding such abandonment." This is mere opinion. It was not at

all in judgment—a thought in the mind, not maturely considered for actual judgment. *Betz* v. *Maxwell,* 48 Kan. 143, 29 Pac. 147, seems to support the defense in saying that as the landlord, from abandonment of possession, knew of the intention to quit, formal notice was useless. This seems to be answered by the quotation above from *Currier* v. *Barker.* And it runs counter to the principle which all authorities assert—that mere abandonment will not dispense with notice, but the tenancy and liability for rent go on. "The tenant's liability for rent continues till he puts an end to the estate by notice, whether he continues to occupy the premises or not." 1 Washb. R. Prop. § 807. So far is this so that the landlord may, at his choice, relet and recover the difference, or let the premises stand vacant. *Merrill* v. *Willis,* 51 Neb. 162, 70 N. W. 914; 6 Ballard, R. Prop. § 462; *Schuisler* v. *Ames,* 16 Ala. 73, 50 Am. Dec. 168. *Adams* v. *Cohoes,* 127 N. Y. 175, 28 N. E. 25, is strongly relied on. The judge writing the opinion does say that knowledge of intention to quit, brought home to the landlord, will dispense with formal notice. In the vast mass of New York decisions it is readily noticed there are multitudinous conflicts. This case is in conflict with other decisions in New York itself. It seems that the New York statutes entered into the case.

We do not go on the theory that the former decision is *res judicata* to fix right to recover the rent involved in the present case. That case was for rent for a certain period of time; this, for another. That case is *res judicata* to establish that it was a tenancy from year to year, but did not say how long. A case may settle principle, but not be *res judicata* as to matters not immediately involved.

We are compelled to reverse the judgment and render for the plaintiff for his demand.

CHAPTER V.

USES AND TRUSTS.

Before the Statute of 27 Henry VIII, c. 10.

THE STATUTE OF USES, 15 Rich. II, c. 5, A. D. 1391.

Whereas it is contained in the Statute De Religiosis, That no religious, nor other whatsoever he be, do buy or sell or under color of gift, or term, or any other manner of title whatsoever, receive of any man, or in any manner by gift or engine cause to be appropriated unto him any lands or tenements, upon pain of forfeiture of the same, whereby the said lands and tenements in any manner might come to mortmain; and if any religious, or any other, do against the said statute by art or engine in any manner, that it be lawful to the king and to other lords upon the said lands and tenements to enter; as in the said statute doth more fully appear: and now of late by subtle imagination and by art and engine some religious persons, parsons, vicars, and other spiritual persons, have entered in divers lands and tenements, which be adjoining to their churches, and of the same, by sufferance and assent of the tenants, have made church yards, and by bulls of the Bishop of Rome have dedicated and hallowed the same, and in them do make continually parochial burying without license of the king and of the chief lords; therefore it is declared in this parliament, that it is manifestly within the compass of the said statute; and moreover it is agreed and assented, that all they that be possessed of feoffment or by other manner to the use of religious people, or other spiritual persons, of lands and tenements, fees, advowsons, or any manner other possessions whatsoever, to amortise them, and whereof the said religious and spiritual persons take the profits, that betwixt this and the feast of St. Michael next coming they shall cause them to be amortised by the license of the king and of the lords, or else that they shall sell and aliene them to some other use, between this and the said feast, upon pain to be forfeited to the king and to the lords, according to the form of the said Statute of Religious, as lands purchased by religious people; and that from henceforth no such purchase be made, so that such religious or other spiritual persons take thereof the profits, as afore is said, upon pain aforesaid; and that the same statute extend and be observed of all lands, tenements, fees, advowsons, and other possessions purchased or to be purchased to the use of guilds or fraternities. And moreover it is assented, because mayors, bailiffs, and commons, of cities, boroughs, and other towns which have a perpetual commonalty, and others which have offices per-

petual, be as perpetual as people of religion, that from henceforth they shall not purchase to them and to their commons or office upon pain contained in the said Statute De Religiosis; and whereas others be possessed, or hereafter shall purchase to their use, and they thereof take the profits, it shall be done in like manner as is afore said of people of religion.

MESSYNDEN v. PIERSON, in Chancery, A. D. 1417-24—Select Cases in Chancery No. 117.

To the most reverend and gracious father in God, the Bishop of Durham, Chancellor of England:

Humbly beseecheth your continual orator, Thomas Messynden the younger, That whereas Thomas Messynden his father enfeoffed Richard Pierson, parson of the church of Hatcliffe, John West, parson of the church of Bradley, John Barnaby of Barton the younger, and John See of Little Coates, in certain lands and tenements in the town of Healing in the county of Lincoln, to the value of £10 a year, on condition that the said feoffees should enfeoff the said suppliant in the lands and tenements aforesaid when he should come to the age of 18 years; and now the said suppliant is of the age of 18 years and more, and he hath many times requested the said feoffees to enfeoff him in the said lands and tenements according to the wish and condition of his said father; and they do utterly refuse, and say that they will hold the said lands and tenements to their own use: May it please your most gracious lordship to grant certain writs to send for the said feoffees on certain pains by you to be limited, to answer before you in the chancery, and to declare wherefore they will not enfeoff the said suppliant according to the wish and condition aforesaid; for God and in way of charity; considering, most gracious lord, that the said suppliant can have no recovery at common law.

The above is all that appears in the Calendar from which it is taken, spelling modernized. What was done with the case after the bill was filed does not appear. There are very few decrees entered in the calendars. From the fact of the filing of such a bill, and that the same book is filled with others much like it, we may fairly infer that if the allegations were sustained by the proof, a conveyance by the feoffees was ordered, though prayer for such relief should have been made. This particular bill is of interest, among other things, by reason of the fact that it so nearly resembles the form of the modern bill in chancery; as do the others found with it; and the substance of the bill illustrates how such uses were enforced at that time. Observe that the use to the complainant in this case corresponds in substance with what came to be known as the springing use after the statute of uses, 27 Hen. VIII, c. 10. The fact that such uses were commonly given effect without question in chancery before the statute, is why they were admitted to be good at law after the statute, though in violation of the law of remainders.

EXAMINATION BY THE BISHOP OF BATH AND WELLS, Chancellor of England. Reported in Calendar Chancery vol. 1, p. xliii, also in Digby's History of Real Property (5th ed.) p. 337.

Be it had in mind that the x day of August, the reign of King Henry the sixth, after the conquest xvi, [A. D. 1438]. John Glover of Wyntenayse Herteley, in the shire of Southampton, husbandman, and Thomas Attemore, of the same town, husbandman, appearing before the right reverend father in God, the Bishop of Bath and Wells, Chancellor of England, in his manor of Dogmersfield, and there examined severally upon a certain feoffment made to them by one Robert Crody, of certain lands and tenements in the town afore specified, said and confessed expressly by their oaths upon a book, how that said Robert, the Wednesday next after the feast of St. Michael, the year of the reign of King Henry the fifth, after the conquest viii, [1421] in the evening, lying in a house of his own at the said town, so sore sick in his bed that for his sickness he might not be removed, in to so much that in the same night following he died, called to him the said John and Thomas, saying to them in this manner: "Sirs, ye be the men in whom I have great trust afore much other persons, and in especial that such will as I shall declare you at this time, for my full and last will, shall through your good help, by our lord's mercy, be performed; Wherefore I let you have full knowledge, that this house which I lie in, and all my other lands and tenements in this town, I give and grant to you, to hold to you, your heirs and assigns, to this intent, that after my decease you shall make estate of the same house, lands and tenements to Alice my wife for term of her life, so that after her death they remain to Margaret my daughter, and to the heirs of her body lawfully becoming, and if she die without heir of her body coming, that then they remain to my right heirs forever more. And to the intent that this my last will may be performed by you, as my trust is that it shall be, here at this time I deliver you possession of this house, in the name of all my lands and tenements afore specified, as wholly and entirely as they were ever mine at any time." By force whereof the said John and Thomas were possessed of the house, lands and tenements aforesaid, in their demesne as of fee, and of the same house, lands and tenements made estate to the said Alice, after the death of her said husband, according to the intent and will afore declared.

ANON., 7 Edw. 4, A. D. 1468—Brooke Abr. t. Conscience 27.

Cestui que use shall have a subpœna against his feoffees in use for their authority to maintain an action in their names; and by the judges, they shall plead such pleas as the *cestui que use* shall give them, wherefore of delays. And if a man give his goods to his use, and another seize them, the donee is bound to maintain an action of trespass on this; but not appeal of robbery: by CHOKE and LITTLETON. For it would seem on this that the plaintiff should not have authority to wage battle if the defendant should render battle.

ANON., in the Exchequer Chamber, 37 Hen. 6, A. D. 1459—Year-books of 37 Hen. 6, pp. 35b, 36a, pl. 23, noted also in Brooke Abr. tt. Subpoena 1, Conscience 5, Uses 14, Devise 14.

In the exchequer chamber the case was this, that one had four feoffees to his use, and sold his land to one H, and said to two of his feoffees that his wish was that the four feoffees should make a feoffment to H; and these two feoffees gave notice to the others that the wish of their feoffor was that they make feoffment in fee to H; and these two refused to make the feoffment to H; but the two whom the feoffor notified made estate to H of what was to them. And afterwards the feoffor sold the land to one J, and came to the two feoffees who refused to make estate to H and requested them to make feoffment to J, and so enfeoff of their part. And the said H brought his writ of subpœna in the chancery against these two feoffees that refused to make estate to him. And this matter was adjourned into the exchequer chamber, because the two feoffees to whom the feoffor gave notice did not say to the others that their feoffor requested and commanded them to make the feoffment, but only gave notice of the wish of their feoffor, on which they were not bound to act without command and request of the feoffor. THE OPINION OF THE JUSTICES was that they should go quit of this subpœna and be discharged because they need not enfeoff but according to law. Some said that although the feoffor should send one of his servants to the feoffees to command them to make feoffment according to his will, the feoffees would not be bound to make the feoffment without a specialty to prove his will; which note. And, it was said by JENNEY, out of court, that he saw a case in which the will of one was that his feoffees should make an estate for the term of life to one J, the remainder to one C in fee; and the said J would not take the estate, this C had a subpœna against the feoffees to make the remainder to him after the death of J. FINCH agreed, and said that in this case the feoffees should make an estate for life to J, and if he refused, the feoffees should make an estate for his life to a certain person for the use of the deceased, the remainder as above. So that although the first who would take the estate should refuse, yet those in remainder should have their remedy, as above, permitting it to remain with them in their lives. And this is not like to a devise where one devises lands devisable, to-wit, to one for term of life, the remainder over, or divers remainders over, and dies; if the first who should take the estate refuse, those in remainder would not have subpœna against the feoffees, or execution, to do as above. For although he who should have the first estate refuse, yet the devise took effect meanwhile in all by the death of the devisor; and although the tenant for term of life should not enter for all his life afterwards, he in remainder may enter as well as the tenant for term of life might enter, for these took effect by the death of the devisor and all at one time. But here it is not so, for he in the remainder may not enter while he for the term of life took an estate according to the will. And if the tenant for term of life refuse, he in remainder having no remedy during the

life of the tenant for term of life, the feoffees might give or sell the land, and perhaps afterwards die during the life of the tenant for term of life, and then they would be without remedy. For default of subpœna they might not enter, and so without remedy; and this is why they should have their subpœna during the life of the tenant for life. Which note.

ANON., Easter term, A. D. 1469—Yearbook 4 Edw. IV, 8, pl. 9, Digby's History of the Law of Real Property 338.

In a writ of trespass for breaking the close with force and arms and cutting down the trees, treading down and destroying the grass, &c. *Catesby* [for defendant]: The plaintiff ought not to have his action, for we say that long before the supposed trespass one J. B. was seized in fee of certain land and died so seized, which then descended to the defendant as heir at law of the said J. B., being the place where the trespass is supposed to have been committed, and the defendant being seized in fee of the said lands enfeoffed the plaintiff in fee, to the use of the defendant and upon confidence, and then the defendant and by sufferance of the plaintiff and at his will occupied the land and cut the trees within the said land and depastured the herbage, which are the trespasses complained of in the action. *Jenney* [for the plaintiff]: That is no plea, for that is no certain matter—the sufferance of the plaintiff and that the defendant occupied by the will of the plaintiff—for such sufferance and will cannot be tried, for the intent of a man is uncertain, and a man should plead such matter as is or may be known to the jury, if issue should be taken thereon; and this cannot be upon the alleged sufferance or will of the plaintiff that the defendant should occupy, &c.; wherefore in such a case to make a good issue or matter traversable, he should plead the lease made by the plaintiff to the defendant to hold at his will, which is matter traversable and that may be tried. *Catesby:* Wherefore should the defendant not avail himself of this matter, when it follows by reason that the defendant enfeoffed the plaintiff to the use of the defendant, and so that the plaintiff is only in the land to the use of the defendant, and the defendant made the feoffment to the plaintiff in trust and confidence? And the plaintiff suffered the defendant to occupy the land so that by reason that the defendant occupied the land at his will, this proves that the defendant shall have the advantage of this feoffment in trust, in order to justify his occupation of the land by this cause, &c. MOILE [J.]: This is a good ground of defense in chancery, for the defendant there shall aver the intent and purpose upon such a feoffment; for in the chancery a man shall have remedy according to conscience upon the intent of such a feoffment; but here by the course of the common law, in the common pleas or king's bench, it is otherwise; for the feoffee shall have the land, and the feoffor shall not justify contrary to his own feoffment that the said feoffment was made in confidence or the contrary. *Catesby:* The law of chancery is the common law of the land, and there the defendant shall have advantage of this matter and feoffment; where-

fore then shall he not have it in the same manner here? MOILE: That cannot be so here in this court, as I have said already, for the common law of the land is different from the law of chancery on this point.

Catesby passed over the point; and as to the trees he repeated the former plea, and said that he had no other answer. As to the herbage, he said that the plaintiff was seized in fee and leased the land to the defendant to hold at his will, &c.; wherefore the defendant entered and committed the alleged trespasses, for which this action was brought. *Jenney* traversed the lease, &c.

ANON., Easter term, 22 Edw. IV, 6, pl. 18, A. D. 1483.

In the exchequer chamber, before all the justices of the one bench and the other, and many sergeants and apprentices, the archbishop of York, then being lord chancellor of England, asked the advice of the justices of granting a subpœna; and said that one had complained to him that he was bound in a statute merchant to another, and had paid the money and not taken a release, and notwithstanding this the recognusee had sued execution; and he said that the recognusee did not wish to say if he was examined but that it is paid; and he said, my lords, ought I to grant the subpœna? FAIRFAX [J.]. It seems to me that it would be wholly against reason to grant a subpœna and by two witnesses after making a matter of record; for where one is bound in such form he is not bound to pay without acquitance or release, as if a man is bound by bond, he is not bound to pay this debt unless the obligee will make an acquitance; and so it seems to me that it is his folly. The CHANCELLOR said that it is the common course in the chancery to grant a subpœna against an obligation, and also on a feoffment in trust where the heir of the feoffee is in by descent or otherwise, for we find records in the chancery of such. HUSSEY, the chief justice of the king's bench: When I first came to the court, which is now 30 years ago, it was agreed in a case by the whole court that if a man should enfeoff another in trust, if he should die seized so that the heir is in by descent, then no subpœna lies; and there is great reason that it should be so, for by the same reason that a subpœna by two witnesses may disprove descent in the chancery, I say that as well may it disprove twenty descents, which is against reason and conscience. So that it seems to me no worse to make him who suffers another to die seized of his land lose the land, than to cause others to be disinherited by witnesses in the chancery. And so it is in the statute merchant, and also in the bond, it is no worse to make them pay who by their negligence are behind, than that two witnesses in the chancery should disprove a matter of record or specialty, where it is his own negligence and he is not bound to pay before he has the acquitance of the plaintiff or his release; and I say this for law, and so is the law. And this said the CHANCELLOR: Then it is great folly to enfeoff another of my land. And afterward the chancellor assented as to the statute

merchant because it is a matter of record, and as to the remainder he said he would be advised.

STATUTE OF USES, 1 Rich. III, c. 1, A. D. 1483.

Forasmuch as by privy and unknown feoffments, great unsurety, trouble, costs, and grievous vexations daily grow among the king's subjects, insomuch that no man that buyeth any lands, tenements, rents, services, or other hereditaments, nor women that have jointures or dowers in any lands, tenements, or other hereditaments, nor men's last will to be performed, nor leases for term of life or of years, nor annuities granted to any person or persons for their services for term of their lives or otherwise be in perfect surety, nor without great trouble and doubt of the same because of the said privy and unknown feoffments; for remedy whereof, be it ordained, established, and enacted by the advice of the lords spiritual and temporal, and by the commons in this present parliament assembled, and by authority of the same, that every estate, feoffment, gift, release, grant, leases, and confirmations, of lands, tenements, rents, services, or hereditaments, made, or had, or hereafter to be made or had by any person or persons, being of full age, of whole mind, at large, and not in duress, to any person or persons; and all recoveries and executions had or made, shall be good and effectual to him to whom it is so made, had, or given, and to all other to his use, against the seller, feoffor, donor, or grantor thereof, and against the sellers, feoffors, donors, or grantors, his or their heirs, claiming the same only as heir or heirs to the same sellers, feoffors, donors, or grantors, and every of them, and against all other having or claiming any title or interest in the same, only to the use of the same sellor, feoffor, donor, or grantor, sellers, feoffors, donors, or grantors, or his or their said heirs at the time of the bargain, sale, covenant, gift or grant, made, saving to every person or persons such right, title, action, or interest, by reason of gift in tail thereof made, as they ought to have had if this act had not been made.

ANON., in Common Bench, Easter term, 17 Hen. 7, A. D. 1502—Keilwey 41b.

In the common bench the opinion was that he to whom the use of lands is in fee simple, made by the statute [1 Rich. 3, c. 1] make a lease or bargain of the land, also that he may well sell the trees growing on the land, and his sale is good.

ANON., in Common Bench, Easter term, 17 Hen. 7, A. D. 1502—Keilwey 41b.

In the common bench in a plea on an avowery made by the feoffor to the use of land in conscience, it was moved and argued whether he might seize in his own right beasts of one being on the land damage feasant, or not. It was said by some that he may, for a tenant at will may distrain for damage feasance, and may protect his interest by outlawry, and so

may such a feoffor who is a tenant at sufferance; and a commoner may seize distresses for damage feasance, and yet he has nothing in the soil, but he may do this for the damage which he suffers; wherefore, inquire well what manner of tenant this feoffor should be said to be in law. Afterwards it was held in the same term, that the said tenant at sufferance may not distrain beasts damage feasant, nor may he have an action of trespass in his own name, but the feoffees shall have the action. NOTE after in Mich. term, 18 H. 7, it was adjudged that the feoffor may not take the beasts, &c. More of this case, Pasche, 17 H. 7, Keilwey 42, case 7; and tenant at sufferance, Michaelmas, 18 H. 7, Keilwey 46a, case 2 [same case? Y. B. Hilary, 15 Hen. VII, 2, pl. 4].

LORD CHAMBERLAIN DAYBENEY v. CHICHESTER, in exchequer chamber, Trinity, 22 Hen. 7, A. D. 1507—Keilwey 93, 4 Jenk. Cent. case 94.

A man seized to the use of me and my heirs male of my body, and for default of such issue male to the use of a stranger in fee, made a gift of it to me and my heirs general of my body, &c. Afterwards I die seised without heir male, and my heir general (daughter) of my body enters. My heir general is seized to the use of the stranger to whom the remainder in fee was in the use, in case that I have notice of the use at the time that the general gift was made. By the opinion of all the justices of England.

ANON., 14 Hen. 8, 4, pl. 5, A. D. 1522—Brooke t. "Feoffments to Uses." 10.

Replevin. The defendant avowed on a rent charge, on this that J. D. and J. B. were seised of nine acres of land before, &c., in fee to the use of R. N. [W. N.?] of the gift of R., and granted the rent to Alice, who was the wife of R., for the term of her life, with clause of distress; and she distrained and avowed as in her rent charge. And the plaintiff said that J. D. and J. B. were seised in fee to the use of W. N., and granted the rent to said Alice, she having notice of the said use; and J. D. and J. B. enfeoffed H., and afterwards W. N. who was *cestui que use* released to said H. all his right in the land, without this that J. D. and J. B. were seized to the use of said R. N. And the defendant demurred in law on the bar of the avowery. And the matter is if the rent should be to the use of the *cestui que use* as the land before, &c., was, or if the rent should be to the use of the grantee. By POLLARD, BROOKE, and FITZHERBERT, justices: The rent should be to the use of the *cestui que use;* and the release of the *cestui que use* to the feoffees extinguished the rent by the statute of 1 Rich. 3 [c. 1]; which wills that the release of the *cestui que use* shall be good against him, his heirs and feoffees and their heirs; and it was agreed by all in a manner that the rent followed the nature of the land, as in ancient demesne, borough English, gravelkind, and the like. * * * And it was held that where feoffees in use were, their heirs and feoffees and all who should be in in the *per,* without consideration, or with consideration if they had notice of the first use, should

be seised to the same use; the contrary of those who were in in the *post.* For by NUDYGATE, if feoffees to use die without heir and the lord enter by escheat, he shall be seised to his own use; and the heir of the feoffee being within age, he shall be in ward to the lord, and the lord shall have the profits; and the widow of the feoffee shall be endowed to her own use, for her estate is made by law though she is adjudged in through her husband, for yet this is by the law, whether the man will or not; and a man taking a wife that is seised to use, shall be tenant by the curtesy, and is in the *post* to his own use; and if the feoffee to uses should be bound in a statute merchant or the like, the land is liable to execution. * * * FITZHERBERT, justice: If a man makes a feoffment without consideration, the feoffees shall be seised to the use of the feoffor, or to the use to which the feoffor was seised; and if a feoffee in use was of a seigniory, and the land escheats, he should have the land to the same use that he had the seigniory, for this came in the place of the seigniory; on the contrary above where the feoffee in use dies without heir, and the land escheats. Note well the diversity. And the same is the law if the feoffee in use recover the land in value on a warranty, this shall be to the first use. POLLARD concurred in this. And by BROOKE, justice: If a feoffee in use makes a feoffment on consideration to one who has no notice of the former use, this changes the use; and on the contrary if the feoffment was without consideration. And the widow of the feoffee that is endowed by the common law shall be seised to her own use; the contrary it would seem of dower *ex accensu patris* or *ad ostium ecclasiae;* for these are by the feoffee, and the other is in in the *per,* by the husband, and yet by the law without the act of the husband. But if a feoffee in use makes a gift in tail, the donee shall be seised to his own use, for there is a consideration, *s.* the tenure between them, unless the use is expressed on the donation, or in the gift; and the feoffee leasing for life having fealty, this is to the use of the lessee if the use was not expressly reserved, &c. And the same is the law of devise and testament; the devisee shall be seised to his own use unless it is otherwise expressed, for there is a consideration implied; and so where a feoffment is made to an abbey or corporation, this shall be to their own use if not otherwise expressly made. POLLARD, justice: Feoffees in use enfeoffing others without consideration, this is to the first use, though the heirs of the feoffee have no notice of the first use. But if it was on consideration and to one who had no notice the use is changed; but if it was on notice and consideration the first use remains. But of a common, or the like, grant by feoffees in use, this shall be to the use of the grantees, and if the feoffee in use release to the tenants that hold of the manor, this shall not be to the use of the *cestui que use.* BRUDNEL, chief justice: If the feoffees to use made a lease for life, the remainder for life, the remainder in fee, and they had notice of the use, they should be seised to the first use, notwithstanding the division of their estates. And by him, for this that a man cannot have land and rent out of the same land, likewise a man cannot have a use of land and a use of the rent

out of the same land; for this is contrary to all the other three justices, and it seems to me clearly that the law is with BRUDNEL, and the rent may not be avoided if not in chancery, and there ought to be notice of the use in the grant and other notice, and a disseisee would neither occupy nor be seised to any use. And, BY ALL THE JUSTICES except BRUDNEL, where feoffees to use make a lease or the like, and the *cestui que use* enters and makes a feoffment over, this should not disprove the first estate, nor avoid any mesne acts, as leases, dower, statute merchant, or the like, made by the first feoffees: On the contrary, BRUDNEL, to whom it seemed that these cases were contrary to themselves and in a manner contrary to their other reasons. * * *

GREY'S CASE, in Common Bench, Easter term, 10 Eliz., A. D. 1568—3 Dyer 274a.

R. G., before the statute 27 H. 8, c. 10, was seised in use of certain lands, to him and the heirs of his body, remainder to H. G., his brother, and the heirs of his body, &c. And before the said statute, a common recovery was suffered by R. G., who vouched the common vouchee; which recovery was executed, and afterwards the recoverers enfeoffed one T. H. to the use of said T. H., and afterwards R. G. died without issue. Whether the ancient feoffees might enter or have an action to recover the land to the first use, or not? And CATLYN, DYER, WESTON, GERRARD and ONSLOW, attorney and solicitor general, thought that they might.

Under the Statute, 27 Henry VIII, c. 10.

THE STATUTE OF USES, 27 Henry VIII, c. 10, A. D. 1536.

An Act Concerning Uses and Wills.

Where by the common laws of this realm, lands, tenements, and hereditaments be not devisable by testaments, nor ought to be transferred from one to another but by solemn livery and seizin, matter of record, writing sufficient and made *bona fide* without covin or fraud; yet nevertheless divers and sundry imaginations, subtle inventions, and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances craftily made to secret uses, intents and trusts; and also by wills and testaments, sometime made by nude *parolx* and words, sometime by signs and tokens, and sometime by writing, and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have scantly had any good memory or remembrance; at which times they being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances; by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries, and other like assurances to uses, confidences and trusts, divers and many heirs have been unjustly at sundry times disherited, the lords have lost their wards, marriages, reliefs, heriots,

escheats, aids *pur fair fits chivalier & pur file marier,* and scantly any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or executions for their rights, titles and duties; also men married have lost their tenancies by the curtesy, women their dowers, manifest perjuries by trial of such secret wills and uses have been committed; the king's highness hath lost the profits and advantages of the lands of persons attainted, and of the lands craftily put in feoffments to the uses of aliens born, and also the profits of waste for a year and a day of lands of felons attainted, and the lords their escheats thereof; and many other inconveniences have happened and daily do increase among the king's subjects, to their great trouble and inquietness, and to the utter subversion of the ancient common laws of this realm; for the extirping and extinguishment of all such subtle practiced feoffments, fines, recoveries, abuses and errors heretofore used and accustomed in this realm, to the subversion of the good and ancient laws of the same, and to the intent that the king's highness, or any other his subjects of this realm, shall not in any wise hereafter by any means or inventions be deceived, damaged or hurt, by reason of such trusts, uses or confidences: it may please the king's most royal majesty, that it may be enacted by his highness, by the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, in manner and form following: that is to say, That where any person or persons stand or be seised, or at any time hereafter shall happen to be seised, of and in any honors, castles, manors, lands, tenements, rents, services, reversions, remainders or other hereditaments, to the use, confidence or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will or otherwise, by any manner means whatsoever it be; that in every such case, all and every such person and persons, and bodies politic, that have or hereafter shall have any such use, confidence or trust, in fee simple, fee tail, for term of life or for years, or otherwise, or any use, confidence or trust, in remainder or reverter, shall from henceforth stand and be seised, deemed and adjudged in lawful seisin, estate and possession of and in the same honors, castles, manors, lands, tenements, rents, services, reversions, remainders and hereditaments, with their appurtenances, to all intents, constructions and purposes in the law, of and in such like estates as they had or shall have in use, trust or confidence of or in the same; and that the estate, title, right and possession that was in such person or persons that were, or hereafter shall be seised of any lands, tenements or hereditaments, to the use, confidence or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have, or hereafter shall have, such use, confidence or trust, after such quality, manner, form and condition as they had before, in or to the use, confidence or trust that was in them.

§2. And be it further enacted by the authority aforesaid, that where

divers and many persons be, or hereafter shall happen to be, jointly seised of and in any lands, tenements, rents, reversions, remainders or other hereditaments, to the use, confidence or trust of any of them that be so jointly seised, that in every such case that those person or persons which have or hereafter shall have any such use, confidence or trust in any such lands, tenements, rents, reversions, remainders or hereditaments, shall from henceforth have, and be deemed and adjudged to have only to him or them that have, or hereafter shall have any such use, confidence or trust, such estate, possession and seisin, of and in the same lands, tenements, rents, reversions, remainders and other hereditaments, in like nature, manner, form, condition and course, as he or they had before in the use, confidence or trust of the same lands, tenements or hereditaments; saving and reserving to all and singular persons and bodies politic, their heirs and successors, other than those person or persons which be seised, or hereafter shall be seised, of any lands, tenements or hereditaments, to any use, confidence or trust, all such right, title, entry, interest, possession, rents and action, as they or any of them had, or might have had before the making of this act.

§3. And also saving to all and singular those persons, and to their heirs, which be, or hereafter shall be seised to any use, all such former right, title, entry, interest, possession, rents, customs, services and action, as they or any of them might have had to his or their own proper use, in or to any manors, lands, tenements, rents or hereditaments, whereof they be, or hereafter shall be seised to any other use, as if this present act had never been had nor made; any thing contained in this act to the contrary notwithstanding.

§4. And where also divers persons stand and be seised of and in any lands, tenements or hereditaments, in fee-simple or otherwise, to the use and intent that some other person or persons shall have and perceive yearly to them, and to his or their heirs, one annual rent of x. li. or more or less, out of the same lands and tenements, and some other person one other annual rental, to him and his assigns for term of life or years, or for some other special time, according to such intent and use as hath been heretofore declared, limited and made thereof:

§5. Be it therefore enacted by the authority aforesaid, that in every such case the same persons, their heirs and assigns, that have such use and interest, to have and receive any such annual rents out of any lands, tenements or hereditaments, that they and every of them, their heirs and assigns, be adjudged and deemed to be in possession and seisin of the same rent, of and in such like estate as they had in the title, interest or use of the said rent or profit, and as if a sufficient grant, or other lawful conveyance had been made and executed to them, by such as were or shall be seised to the use or intent of any such rent to be had, made or paid, according to the very trust and intent thereof, and that all and every such person and persons as have, or hereafter shall have, any title, use and interest in or to any such rent or profit, shall lawfully distrain for non-payment of the said rent, and in their own

names make avowries, or by their bailiffs or servants make conisances and justifications, and have all other suits, entries and remedies for such rents, as if the same rents had been actually and really granted to them, with sufficient clauses of distress, re-entry, or otherwise, according to such conditions, pains, or other things limited and appointed, upon the trust and intent for payment or surety of such rent.

§6. And be it further enacted by the authority aforesaid, that whereas divers persons have purchased, or have estate made and conveyed of and in divers lands, tenements and hereditaments unto them and to their wives, and to the heirs of the husband, or to the husband and to the wife, and to the heirs of their two bodies begotten, or to the heirs of one of their bodies begotten, or to the husband and to the wife for term of their lives, or for term of life of the said wife; or where any such estate or purchase of any lands, tenements, or hereditaments, hath been or hereafter shall be made to any husband and to his wife, in manner and form expressed, or to any other person or persons, and to their heirs and assigns, to the use and behoof of the said husband and wife, or to the use of the wife, as is before rehearsed, for the jointure of the wife; that then in every such case, every woman married, having such jointure made or hereafter to be made, shall not claim, nor have title to have any dower of the residue of the lands, tenements or hereditaments, that at any time were her said husband's, by whom she hath any such jointure, nor shall demand nor claim her dower of and against them that have the lands and inheritances of her said husband; but if she have no such jointure, then she shall be admitted and enabled to pursue, have and demand her dower by writ of dower, after the due course and order of the common laws of this realm; this act, or any law or provision made to the contrary thereof notwithstanding.

§7. Provided alway, that if any such woman be lawfully expulsed or evicted from her said jointure, or from any part thereof, without any fraud or covin, by lawful entry, action, or by discontinuance of her husband, then every such woman shall be endowed of as much of the residue of her husband's tenements or hereditaments, whereof she was before dowable, as the same lands and tenements so evicted and expulsed shall amount or extend unto.

§8. Provided also, that this act, nor anything therein contained or expressed, extend or be in any wise hurtful or prejudicial to any woman or women heretofore being married, of, for or concerning such right, title, use, interest or possession, as they or any of them have, claim or pretend to have for her or their jointure or dower, of, in or to any manors, lands, tenements, or other hereditaments of any of their late husbands, being now dead or deceased; anything contained in this act to the contrary notwithstanding.

§9. Provided also, that if any wife have, or hereafter shall have any manors, lands, tenements or hereditaments unto her given and assured after marriage, for term of her life, or otherwise in jointure, except the same assurance be to her made by act of parliament, and the said wife

after that fortune to overlive her said husband, in whose time the said jointure was made or assured unto her, that then the same wife so overliving shall and may at her liberty, after the death of her said husband, refuse to have and take the lands and tenements so to her given, appointed or assured during the coverture, for term of her life, or otherwise in jointure, except the same assurance be to her made by act of parliament, as is aforesaid, and thereupon to have, ask, demand and take her dower by writ of dower or otherwise, according to the common law, of and in all such lands, tenements and hereditaments as her husband was and stood seised of any state of inheritance at any time during the coverture, anything contained in this act to the contrary thereof notwithstanding.

§10. Provided also, that this present act, or anything herein contained, extend nor be at any time hereafter interpreted, expounded or taken, to extinct, release, discharge or suspend any statute, recognizances or other bond, by the execution of any estate, of or in any lands, tenements or hereditaments, by the authority of this act, to any person or persons, or bodies politic; anything contained in this act to the contrary thereof notwithstanding.

§11. And forasmuch as great ambiguities and doubts may arise of the validity and invalidity of wills heretofore made of any lands, tenements and hereditaments, to the great trouble of the king's subjects; the king's most royal majesty minding the tranquillity and rest of his loving subjects, of his most excellent and accustomed goodness is pleased and contented that it be enacted by the authority of this present parliament, that all manner true and just wills and testaments heretofore made by any person or persons deceased, or that shall decease before the first day of May, that shall be in the year of our Lord God 1536, of any lands, tenements or other hereditaments, shall be taken and accepted good and effectual in the law, after such fashion, manner and form as they were commonly taken and used at any time within forty years next afore the making of this act; anything contained in this act, or in the preamble thereof, or any opinion of the common law to the contrary thereof notwithstanding.

§12. Provided always, that the king's highness shall not have, demand or take any advantage or profit, for, or by occasion of the executing of any estate, only by authority of this act, to any person or persons, or bodies politic, which now have, or on this side the said first day of May, which shall be in the year of our Lord God 1536, shall have any use or uses, trusts or confidences in any manors, lands, tenements or hereditaments holden of the king's highness, by reason of primer seisin, livery, *ouster le main*, fine for alienation, relief or heriot; but that fines for alienations, reliefs and heriots shall be paid to the king's highness, and also liveries and *ouster les mains* shall [be] used for uses, trusts and confidences to be made and executed in possession by authority of this act, after and from the said first day of May, of lands and tenements, and other hereditaments holden of the king, in such like

manner and form, to all intents, constructions and purposes, as hath heretofore been used or accustomed by the order of the laws of this realm.

§13. Provided also, that no other person or persons, or bodies politic, of whom any lands, tenements or hereditaments be or hereafter shall be holden mediate or immediate, shall in any wise demand or take any fine, relief or heriot, for or by occasion of the executing of any estate by the authority of this act, to any person or persons, or bodies politic, before the said first day of May, which shall be in the year of our Lord God 1536.

§14. And be it enacted by authority aforesaid, that all and singular person and persons, and bodies politic, which at any time on this side the said first day of May, which shall be in the year of our Lord God 1536, shall have any estate unto them executed of and in any lands, tenements or hereditaments, by the authority of this act, shall and may have and take the same or like advantage, benefit, voucher, aid prayer, remedy, commodity and profit by action, entry, condition or otherwise, to all intents, constructions and purposes, as the person or persons seised to their use of or in any such lands, tenements or hereditaments so executed, had, should, might or ought to have had at the time of the execution of the estate thereof, by the authority of this act, against any other person or persons, or for any waste, disseisin, trespass, condition broken, or any other offence, cause or thing concerning or touching the said lands or tenements so executed by the authority of this act.

§15. Provided also, and be it enacted by the authority aforesaid, that actions now depending against any person or persons seised of or in any lands, tenements or hereditaments, to any use, trust or confidence, shall not abate ne be discharged for or by reason of executing of any estate thereof by authority of this act, before the said first day of May, which shall be in the year of our Lord God 1536, anything contained in this act to the contrary notwithstanding.

§16. Provided also, that this act, nor anything herein contained, shall not be prejudicial to the king's highness for wardships of heirs now being within age, nor for liveries, or for *ouster les mains,* to be sued by any person or persons now being within age, or of full age, of any lands or tenements unto the same heir or heirs now already descended; anything in this act contained to the contrary notwithstanding.

§17. Provided also, and be it enacted by the authority aforesaid, that all and singular recognizances heretofore knowledged, taken, or made to the king's use, for or concerning any recoveries of any lands, tenements or hereditaments heretofore sued or had, by writ or writs of entry upon disseisin *in le post,* shall from henceforth be utterly void and of none effect, to all intents, constructions and purposes.

§18. Provided also, that this act, nor anything therein contained, be in any wise prejudicial or hurtful to any person or persons born in Wales or the marches of the same, which shall have any estate to them executed by authority of this act, in any lands, tenements or other hereditaments within this realm, whereof any other person or persons

now stand or be seised to the use of any such person or persons born in Wales or the marches of the same; but that the same person or persons born in Wales, or the marches of the same, shall or may lawfully have, retain and keep the same lands, tenements or other hereditaments, whereof estate shall be so unto them executed by the authority of this act, according to the tenor of the same; anything in this act contained, or any other act or provision heretofore had or made to the contrary notwithstanding.

CHUDLEIGH'S CASE, reported later in this book, contains a very full discussion of the history of uses and of the causes and effect of this statute.

STATUTE OF ENROLMENTS, 27 Henry VIII, c. 16, A. D. 1535.

An Act Concerning Enrolments of Bargains and Contracts of Lands and Tenements.

Be it enacted by the authority of this present parliament, that from the last day of July, which shall be in the year of our Lord God 1536, no manors, lands, tenements, or other hereditaments, shall pass, alter, or change from one to another, whereby any estate of inheritance or freehold shall be made or take effect in any person or persons, or any use thereof to be made, by reason only of any bargain and sale thereof, except the same bargain and sale be made by writing intended, sealed, and enrolled in one of the king's courts of record at Westminster, or else within the same county or counties where the same manors, lands, or tenements so bargained and sold lie or be, before the *custos rotulorum* and two justices of the peace, and the clerk of the peace of the same county or counties, or two of them at the least, whereof the clerk of the peace to be one; and the same enrolment to be had and made within six months next after the date of the same writings indented; the same *custos rotulorum* or justices of the peace, and clerk taking for the enrolment of every such writing indented before them, where the land comprised in the same writing exceeds not the yearly value of 40 shillings 2*s.*, that is to say 12 *d.* to the justices and 12*d.* to the clerk; and for the enrolment of every such writing indented before them wherein the land comprised exceeds the sum of 40*s.* in the yearly value, 5*s.*, that is to say, 2*s.* 6*d.* to the said justices, and 2*s.* 6*d.* to the said clerk for the enrolling of the same; and that the clerk of the peace for the time being, within every such county, shall sufficiently enroll and engross in parchment the same deeds or writings indented as is aforesaid, and the rolls thereof at the end of every year shall deliver unto the said *custos rotulorum* of the same county for the time being, there to remain in the custody of the said *custos rotulorum* for the time being, amongst other records of every of the same counties where any such enrolment shall be so made, to the intent that every party that hath to do therewith may resort and see the effect and tenor of every such writing so enrolled.

§2. Provided always, that this act, nor anything therein contained,

extend to any manors, lands, tenements, or hereditaments, lying or being within any city, borough, or town corporate within this realm, wherein the mayors, recorders, chamberlains, bailiffs, or other officer or officers have authority, or have lawfully used to enroll any evidences, deeds, or other writings within their precinct or limits, anything in this act contained to the contrary notwithstanding.

What Uses are Executed by the Statute of Uses, 28 Henry VIII, c. 10.

ANON., 36 Hen. 8, A. D. 1545—Brooke's New Cases, pl. 282, Marsh's Translation t. Feoffments to Uses, Bro. Abr. t. Feoffments to Uses 52.

A man makes a feoffment in fee to his use for term of life, and that after his decease J. N. shall take the profits, this makes a use in J. N. Contrary if he said that after his death his feoffees shall take the profits and deliver them to J. N., for this doth not make a use in J. N., for he hath them not but by the hands of the feoffees.

Between ANDREW BAINTON, petitioner, and the Queen, in the Exchequer Chamber, Mich., 1 Mary, A. D. 1553—Dyer 96a.

Sir Thomas Seymour, late admiral, who was attainted, by indenture, covenanted and granted to Andrew Bainton, in consideration that the said Andrew had conveyed divers manors, lands, and tenements to the said Sir T. in fee simple after the death of the said Andrew, that he the said Sir T. would levy a fine to Warnford and Penney of other manors (by name), of which the admiral was then seized, by which fine the said other manors should be assured to the said Sir. T. Seymour for the term of his life, remainder to the said Andrew in tail, and no fine was levied of it. And it was moved at Serjeants' Inn, whether this covenant would change an use or not. And BROMELEY, chief justice, PORTMAN, BROWN, SAUNDERS [JJ.], BROOKE, chief baron, WHIDDEN [B.], and GRIFFITH, attorney general, and MYSELF, thought that this shall alter no use immediately; for then by no possibility could the covenant ever be performed, and it is in the future tense. But they agreed in a manner, that if I covenant, in consideration of marriage, or for a sum of money paid me, *that the party shall have the said manor of D,* by express words, this shall change an use immediately, for there is no estate to be made. It was also agreed, that if *cestui que use* wills that his feoffees shall make estate to J. S. in tail or fee, and die, the use changes before the estate be executed, &c.

In consideration of a marriage to be had, one seised in fee covenanted to levy a fine before such a day, and that the covenantor shall stand seised to the use, &c., but no fine was levied; and it was held that no use was raised, and that the words could not operate as a covenant to stand seised, for thereby power to levy the intended fine would be lost. Hale v. Cockerell (in C. B. 35 Car. 2, A. D. 1685), 3 Lev. 126. To the same effect see Barrington v. Crane (1686), 3 Lev. 306, citing and following Bainton's Case.

TYRREL'S CASE, in Court of Wards, 4 & 5 Mary, A. D. 1557, 2 Dyer 155a.

Jane Tyrrel, widow, for 400*l.* paid by G. Tyrrel, her son and heir apparent, by indenture enrolled in chancery, in the 4th year of Ed. 6, bargained, sold, gave, granted, covenanted, and concluded to said G. Tyrrel all her manors, lands, tenements, &c., to have and to hold, the said, &c., to the said G. T. and his heirs forever, to the use of the said Jane during her life, without impeachment of waste, and immediately after her decease to the use of the said G. T. and the heirs of his body lawfully begotten, and in default of such heirs to the use of the heirs of the said Jane forever. *Quære* well whether the limitation of those uses upon the *habendum* are not void and impertinent, because an use cannot be springing, drawn, or reserved out of an use, as appears *prima facie?* And here it ought to be first an use transferred to the vendee before that any freehold or inheritance in the land can be vested in him by the inrollment, &c. And this case has been doubted in the common pleas before now, *ideo quære legem.* But all the judges of C. B. and SAUNDERS, chief justice, thought that the limitation of uses above is void, &c.; for suppose the statute of inrollments [27 Hen. 8, c. 16] had not been made, but only the statute of uses, in 27 Hen. 8 [c. 10], then the case above could not be, because an use cannot be ingendered of an use.

GIRLAND v. SHARPE, in Queen's Bench, Easter, 37 Eliz., A. D. 1596, Cro. Eliz. 382.

Trespass. Upon demurrer the case was, that one infeoffed his sons to the use of himself for life, and after to the use of them and their heirs, to perform his last will; and afterwards he devised it to Sharp, the defendant, in fee; and whether Sharpe thereby shall hereby have the land was the question. GAWDY [J.] conceived that he should not; for an use cannot be limited upon an use; then when he limits it to the use of his two sons and their heirs, he cannot afterwards limit it to the uses of his last will; but the words *to perform the last will*, as to limit any uses thereby, are void words. And to that opinion CLENCH [J.] agreed; but FENNER [J.] doubted thereof; wherefore it was adjourned.

ANON., in Exchequer Chamber, 2 Eliz. A. D. 1561, 2 Dyer 179b, 5 Jenk Cent. Case 70.

A man seised in fee of lands in borough English, after the statute 27 H. 8 [c. 10], made a feoffment to divers persons in fee to the use of himself and of his heirs male of his body, begotten according to the course of common law; and afterwards died seised accordingly, having issue two sons. The eldest entered and held out the youngest. *Quære.* And all the board in Sargeants' Inn thought that the youngest shall have it by descent, notwithstanding the words aforesaid. See 26 H. 8 [Dyer], fol. 5a.

Jenkins says this decision was by Catlin, Dyer, Saunders, Whiddam, Browne and Bendlowes.

ANON., in Common Bench, Trinity term, 14 Eliz., A. D. 1572—3 Dyer 314b, pl. 97.

A man by his deed indented and sealed, and dated 13 Hen. 8, declared, that whereas he had suffered a common recovery against himself, by divers of his friends, upon trust and confidence, of certain lands, to the intent of performing his will touching the disposition of the said lands: first, he willed, that his said feoffees and their heirs should suffer him to have and receive annually the issue and profits thereof coming and issuing during his life, and after his decease to stand seised of the third part thereof to the use of his wife during her life, and after her decease to stand seised of the premises, and the reversion thereof after his decease, to the use of R., his son, and the heirs of his body, with other remainders over, &c. Whether he may alter and change during his life the uses limited in the indenture or not? And it seems to me that he may well alter this will, for *will* and *last will* are understood to be all one, and this recovery was to the intent to perform the will, and this indenture is as a will, which is alterable; therefore it is not a limitation of uses upon livery made, according to the 19th year of Hen. 8 [11a, pl. 5]. And other justices agreed to this opinion.

ANON., in Common Bench? Hilary, 18 Eliz., A .D. 1576—Dyer 349a.

The conusor levied a fine of his lands to the conusee and others, and to the heirs of the conusee, to the use of a stranger in fee. Whether that extinguishes the execution of the recognizance or not? And it seems not, for the statute 27 Hen. 8 of uses, &c., hath a saving for elder rights, titles, interests, actions, &c., that they then had, or afterwards should have, &c.

QUESTION BY THE LORD CHANCELLOR, in Exchequer Chamber, 22 Eliz., A. D. 1581—3 Dyer 369a, pl. 50, 6 Jenk. Cent. case 30, p. 244.

A being possessed of a lease for a term of years, granted all his estate and interest to B and C and their assigns, to the use of said A and his wife, for the term of their lives, and of the longer liver of them. And afterwards said A gave to a stranger such interest as he then had in the said lands in lease, and died. Whether this grant made by A gave all the term of B and C or not? And it was answered by all the justices and the chief baron, in a meeting on the first day of the next Trinity term, that the gift or grant of him, in trust for whom the term was granted, was void, and out of the statute of *cestui que uses* [27 H. 8, c. 10].

PAGE v. MOULTON, in Common Pleas, 12 & 13 Eliz., A. D. 1572—3 Dyer 296a.

The father, upon communication of marriage of his youngest son, promised to the friends of the wife, that after his death and the death of

his own wife the son should have the land to him and his heirs. And the marriage is had, but this promise is by parol only, and no consideration on the part of the woman, and the father was seized in his demesne and not in use; and this found by special verdict upon not guilty. Whether the use changes by this covenant or not was the doubt. And by opinion of all the four justices of the bench, without open argument, the use is not altered by such a naked promise, and so adjudged.

In Corbin v. Corbin (1586), Moore 544, s. c. 2 Roll Ab. 784, pl. 4, three justices declared that a use might be created by parol on natural affection, but the point was not decided.

CALLARD v. CALLARD, in B. R., Hilary, 35 Eliz., and in Exc. Chamber, Hilary term, 39 Eliz., A. D. 1597—Moore 687, s. c. 2 And., 64, Popham 47, Cro. Eliz. 344, Jenk. Cent. 245.

Ejectione firmæ on the demise of Eustace Callard. And on not guilty pleaded, it was found by special verdict, that Thos. Callard was seized in fee, and in consideration of the marriage of Eustace his son and heir apparent, being on the land, spoke these words to Eustace: "Eustace, stand forth. I do here, reserving an estate for mine own and my wife's life, give unto thee and to thine heirs forever, those my lands and Barton of Southcot." Afterwards Thomas enfeoffed in fee with warranty to Richard, a younger son, now defendant, and died. Eustace entered and made demise to the plaintiff, who entered, and the defendant ejected him. On which special verdict, in the queen's bench, after long argument, judgment was given for the plaintiff: on which the defendant brought a writ of error in the exchequer chamber, where the judgment was reversed, Hilary 39 Eliz. Note that in the queen's bench, POPHAM, chief justice, held strongly, that the consideration of blood raised the use to Eustace without writing, and so he had the possession by the statute of 27 Hen. 8 [c. 10]. But GAWDY, FENNER, and CLENCH [JJ.], against this opinion; yet in the final judgment they agreed, because they held that the words amounted to a feoffment with livery, being on the land, and the use to be to the feoffor and his wife for life, and then to Eustace and his heirs. But note that in the exchequer chamber, EWANS [B.] held the law to be as the puisne justices of the queen's bench said, and so the judgment should be affirmed; but he was against POPHAM [C. J.], that a use did not arise without writing. BEAUMONT [J.] held this a feoffment to Eustace in fee, and the reservation to the father and his wife void for repugnancy; and so he would have the judgment affirmed; and he was also against POPHAM [C. J.]. But all the other justices, ANDERSON [C. J.], PERIAM, CLARK [BB.], WALMSLEY, and OWEN [JJ.] agreed that no feoffment was executed, because the intent was repugnant to law, viz.: to pass an estate to Eustace, reserving a particular estate to himself and his wife; and a use it cannot be, because the purpose was not to raise a use without an estate executed, but by an estate executed that could not have effect. And they all agreed that if this was a use, yet it would not arise on

natural affection without deed. Note that the witnesses who proved these words were attainted of perjury in the star chamber Easter 40 Eliz.

In Callard v. Callard, in B. R. 36 & 37 Eliz., vide Cro. Eliz. 345, Gawdy, J., said: "I have not seen any book, that at common law, a use shall arise by parole, but in a bargain and sale which is by reason of the consideration given for the land." But Popham, C. J., said it was adjudged in 7 Edw. 6 that a use may arise by parole, and he could show the record of it.

CRAWLEY'S CASE, in Common Bench, Mich. term, 41 & 42 Eliz., A. D. 1600—Cro. Eliz. 721.

Replevin. A rent was granted to two during the life of J. S., to his use. Whether if the two die, living J. S., the rent were gone or no was the question. For it was agreed that there cannot be an occupancy of a rent. Dyer 186. It was held that it was not gone, especially in this case; [for] the rent being granted to the use of J. S., it vested in him by the 27 Hen. 8, c. 10, so as he had an absolute estate during his life, and the lives of the grantees are not material, the estate being transferred from them. Otherwise it would have been a grant to an use before the statute.

HUSSEY'S CASE, in Exchequer, 2 Jac. 1, A. D. 1605—Moor 789.

Hussey, a bastard, bought a manor and made his will by which he devised it; and afterwards he made a feoffment of the same manor to the use of such persons and estates as he had by his will given and declared. It was adjudged that the feoffment countermanded the will, and yet that the revoked will sufficiently declared the uses of the feoffment, so that there was no escheat to the crown.

CASTLE v. DOD, in King's Bench, Mich. 5 Jac. 1, A. D. 1608—Cro. Jac. 200, 1 Cruise Dig. 455.

A, tenant for life, granted by fine his estate to B and by indenture limited the use to B for the life of A and B, and if he died living A, that it should remain to C. Afterward B died living A. C entered and let to D for years and died, living A. Whether the lessee should retain it as an occupant, living A, or that A should have it again (because no other use is limited after the death of C) by reason of his ancient use, was the question. And after argument IT WAS ADJUDGED that C should have it as an occupant, and his lessee should hold it as an occupant, and that A had not any residue of the use in him. For although, where tenant in fee makes a deed of feoffment, and limits the use for life or in tail, and doth not speak of the residue, it shall be to [the use of] the feoffor, or conusor, because he had the ancient use in him in fee; yet when a tenant for life, or he who hath a particular estate, grants his estate by fine, and limits the use for years, or for a particular time, it shall not return to him, but be to the conusee, though the fine were

without any consideration; because he who hath the particular estate by fine is subject to the ancient rent and forfeiture, which is a sufficient consideration to convey the estate unto him. And although it was objected, that at the common law there was not any occupant of an use, and this statute [27 Hen. 8, c. 10] hath vested the possession in such manner and nature as the use was, *ergo* there shall not be an occupant of a possession vested to an use. * * *

COOPER v. FRANKLIN, in King's Bench, Trinity, 12 Jac. I, A. D. 1616—Cro. Jac. 400, 3 Bulst. 184, 1 Gray P. C. 514, 5 Jenk. Cent. case 1. Given according to Croke.

Ejectione firmæ. Upon a special verdict, for lands in Phelphan, the case was: John Walter was seised of lands in fee, and made feoffment of them to Thomas Walter, habendum to him and his heirs of his body to the use of him and his heirs and assigns forever. Whether Thomas Walter had an estate in fee-tail only, or a fee determinable upon an estate-tail, was the question. First, whether a use may be limited upon an estate-tail at the common law, or at this day after the statute of 27 Hen. 8, c. 10, of uses; secondly, whether this limitation of uses to him and his heirs shall not be intended the same uses, being to the feoffee himself, and to the same heirs, as it was in the habendum. *Quære, quia non adjudicatur.*

But the opinion of the COURT upon the argument inclined, that he was tenant in tail; and the limitation of the use out of the tail is void as well after the statute as before; for the statute never intended to execute any use but that which may be lawfully compelled to be executed before the statute; but this cannot be of an estate-tail, for the chancery could not compel him at the common law to execute the estate. And so the statute doth not execute it at this day. *Vide:* 27 Hen. 8, pl. 2; 24 Hen. 8, pl. 62, *"Feoffments al Uses"* 41. *Et adjournatur.*

MYTTON v. LUTWICH, in Court of Wards, Mich. term, 18 James I, A. D. 1621—W. Jones 7, s. c. Croke Jac. 604.

John Lutwich was seised in fee of the manor of Shipton in the county of Salop by knight-service tenure *in capite,* and of other hereditaments in said county; and being so seized, by indenture dated 31 March, 13 James, for a certain sum in silver, granted, bargained, and sold said manor and hereditaments and reversion of this to William Ball, to commence at the feast of annunciation last past, for three years; and by another indenture bearing the same date he covenanted with the said Ball and one Robert Rawlins, that he would levy a fine to them of the premises before the pentecost ensuing, and that the said fine and all other fines so to be levied by any of the said parties should be to the use of John Lutwich in tail, and after to the use of such person and persons and of such estate and limitation as he should declare by his last will in writing. The said John Lutwich, by indenture dated April 1, 13 James, reciting the first bargain and sale to Ball, granted and

confirmed to Lewis Prowde and the said Robert Rawlins the said reversion of said manor and hereditaments in fee to the use of himself in tail, and after to the use of such person and persons and of such estate and on such limitation as he by his last will in writing should appoint; to which grant said Ball said day attorned, but Ball made no entry. Afterward, 15 April, 13 James, J. Lutwich made his last will in writing and published the same in these words: "Whereas I have granted and confirmed to Lewis Prowde and Robert Rawlins the reversion, after a lease made to William Ball should be determined, of the manor of Skipton and other hereditaments in the county of Salop, to the use of myself and the heirs of my body and for default of such issue then to the use of such person and persons, and of such estate and under such limitation, as I should appoint by my last will and testament; Now my intent is, that after my decease without issue of my body lawfully begotten, that said grant of the reversion shall be, and may, and the said Lewis Prowde and Robert Rawlins shall stand and be seised thereof to the use of Edward Mitton for life, the remainder in tail to Edward Weston (with other remainders in tail), and for default of such issue to Lewis Prowde and his heirs forever, with power for Edward Mitton the father to make leases for 21 years." William Ball, 21 April, 13 James, did surrender said indenture of lease and all his estate therein to Lewis Prowde and Robert Rawlins; and in Easter term 13 James, John Lutwich levied a fine thereof to Robert Rawlins and William Ball. J. Lutwich published said will accordingly. May 10, 13 James, J. Lutwich died without heir of his body. All this was found by office, and the said tenure *in capite,* and that Edward Lutwich was his cousin and heir of the age of 40 years. And on this office a doubt was raised in the court of wards; and on this a case was made as aforesaid; and the question of the said case was whether two-thirds of the premises descended to Edward Lutwich, or whether all was well conveyed to Edward Mitton.

And this was argued in the court of wards in the presence of the two chief justices and the chief baron in Mich. term, 18 James, by *Jenkins* for Edward Lutwich and by *Jeffryes* for the defendant, and on another day by *Wandisford* for Lutwich and by *myself* for Mitton; in which the main question was: 1. Where such a bargain and sale is made for years, and before entry by the bargainee the vendor grants the reversion to another in fee and the bargainee for years before entry attorns, whether this is good. 2. Where a fine is levied after the will and yet by the will on the grant of the reversion he declares the use, whether this is a limitation of the use on the estate in reversion or a devise of two-thirds of the land. And in this Hilary term the resolution of the court was demanded by Jeffryes; and Sir James Ley, the attorney, delivered the resolution of the judges, that by the bargain and sale for years the vendee had an estate for years divided from the reversion before entry, and that a reversion was in the vendor which by his grant and the attornment of the vendee for years was well conveyed. 3. They resolved

that the grant of the reversion and fine and the will being declared by the original agreement were to the first use, and the will is a limitation of the use on the first conveyance and not a devise of two-thirds of the land; and according to this resolution a decree was made for Mytton that no third part descended to Edward Lutwich, and that the king should not have any third part nor any livery of the said lands.

NEVIL v. SAUNDERS, in Chancery, before Lord Chancellor Jeffreys, Mich. term, A. D. 1686—1 Vernon 415, Digby Hist. R. P. 376, 1 Gray Cas. on Prop. 535.

Lands were given by will to trustees and their heirs, in trust for Anne, the defendant's wife, and her heirs, and that the trustees should from time to time pay and dispose of the rents and profits to the said Anne, or to such person or persons as she by any writing under her hand, as well during coverture as being sole, should order or appoint the same, without the intermeddling of her husband, whom he willed should have no benefit or disposal thereof; and, as to the inheritance of the premises, in trust for such person or persons, and for such estate and estates as the said Anne by any writing purporting [to be] her will, or other writing under her hand, should appoint; and for want of such appointment, in trust for her and her heirs. The question was, whether this was an use executed by the statute, or a bare trust for the wife; and the court held it to be a trust only, and not an use executed by the statute.

Effect of Consideration.

ANON., court not named, Trinity, 28 Hen. 8, A. D. 1537—Dyer 18a, pl. 105.

It was moved upon evidence by KNIGHTLEY, that if one recover against me by common recovery, and then I enfeoff the recoverer, that he shall be seised to my use, for he shall be adjudged in by the recovery, and not by the feoffment; which SHELLEY and FITZHERBERT in a manner confirmed.

In a note to this case some editor says, "If a man at this day enfeoff a stranger without consideration, the feoffee is seised to the use of the feoffer. Perkins 533; Dyer 96. Therefore intend that the feoffee in this case gave consideration."

ANON., 36 Hen. 8, A. D. 1545. Brooke New Cases pl. 284, Marsh's translation t. Feoffments to Uses.

A man cannot sell land to J. S. to the use of the vendor, nor let land to him rendering rent, *habendum* to the use of the lessor, for this is contrary to reason and law, for he has recompense for it. * * *

ANON., in Common Bench, Mich. 4 & 5 Phil. & Mary, A. D. 1558—1 And. 37, Cas. 96.

If one after the statute 27 Hen. 8 [c. 16], by deed indented and enrolled, or before by a deed for 200*l.*, should bargain and sell his land to another in fee to the use of the bargainor for life, &c., or in fee,

or to the use of a stranger, this use so limited is wholly void; for the bargain for money implies in it a use, and the limitation of the other use is merely contrary, for by this means the use in fee that is in the bargainee in fee only would be tolled if the law were not as before; by the justices in bank.

ANON., time of Elizabeth, court not named—1 And. 37, pl. 95.

Note by all the judges that if one without any consideration infeoff another by deed, *habendum & tenendum* the land to the feoffee and his heirs, to his own use, and the feoffee suffer the feoffor to occupy the land for many years, yet the right is in the feoffee, because of the express use contained in the deed, which is sufficient without other consideration. The same is the law as to a feoffment by deed to the use of a stranger and his heirs.

WILKES v. LEUSON, in Court of Wards, Trinity, 1 Eliz., A. D. 1558—Dyer 169a.

Wilkes * * * made a feoffment in August before his death to one Leuson (a knight) and his brother and another, of the manor of Hodnel in the county of Warwick; and the deed (seen), for 7000£, to him paid by the feoffees, of which sum he made acquittance in the same deed (although in fact and in truth not a half-penny was paid), gave, granted, and confirmed, &c., *habendum to them and theirs forever, to the proper use and behoof of said A, B, & C, forever,* and not *their heirs,* together with a clause of warranty to them, their heirs and assigns, *in form aforesaid.* And notwithstanding this feoffment he occupied the land with sheep, and took other profits during his life; and afterwards his death was found on a *diem clausit extremum* by office, that he died seised of the said manor in fee, and one I. Wilkes his brother of full age found his next heir, and a tenure *in capite* found; and now within the three months the said feoffees sued in the court of wards to be admitted to their traverse, and also to have the manor in farm until, &c. And although the said I. Wilkes the brother had tendered a livery, yet he had not hitherto prosecuted it, but for cause had discontinued. And whether now the master of the wards at his discretion could remove the feoffees by injunction out of possession upon examination of the consideration of the said feoffment which was false, and none such in truth, and retain it in the hands of the queen *donec et quousque,* &c., was a great question. And by the OPINION of the learned counsel of that court, he cannot do it; but the queen is bound in justice to give livery to him who is found heir by the office, or if he will not proceed with that, to grant to the tenderers the traverse, and to have the farm, &c., the request above mentioned. And this by the statutes 34 Edw. 3 [c. 14] and 36 Edw. 3 [c. 13] and 8 Hen. 6 [c. 16] and 3 Hen. 8 [c. 2], notwithstanding the opinion of BRIAN and others in *Benstede's Case,* Trinity, 1 Hen. 7 [27b, pl. 5], according to the new editions and

reports. And note, that no averment can be allowed to the heir, that the said consideration was false against the deed and acknowledgment of his ancestors, for that would be to admit an inconvenience. And note the limitation of the use above, for divers doubted whether the feoffees shall have a fee-simple in the use, because the use is not expressed, except only *to themselves* (by their names) *forever;* but if these words had been wanting, it would have been clear enough that the consideration [*169b] of 7000£ had been sufficient, &c., for the law intends a sufficient consideration by reason of the said sum. But when the use is expressed otherwise by the party himself, it is otherwise. And also the warranty in the deed was *to them, their heirs and assigns, in form aforesaid,* which is a declaration of the intent of *Wilkes,* viz., that the feoffees shall not have the use in fee-simple; and it may be that the use during their three lives is worth 7,000£ and more. * * *

"I take it as a ground of doctrine in our law, that when a sole and single cause or consideration or intent is expressed in a deed or writing of gift, grant, or feoffment, no other cause or consideration or intent shall be joined, mixed, or averred, by matter of fact *dehors*. And therefore before the statute of *Quia Emptores Terrarum* [18 Edw. 1, St. 1], if a man made a deed of feoffment without any cause or consideration, the feoffee should have it to his own use; because it was a tenure between the feoffor and feoffee; but since that statute, if no consideration be expressed, nor any money paid besides, it shall be intended to be the use of the feoffor. The law is the same of a gift in tail at this day, &c. * * * The law is the same where an use is expressed in a deed; and no one shall be received to aver a contrary use to what the deed purports. And 2 Edw. 2 [4 Edw. 2, 90] this case is ruled in *ad terminum qui praeteriit*, upon a demise by his ancestor, the tenant pleaded the demise in fee-simple to one whose estate the tenant had, by the same ancestor of the demandant, whose heir, &c., by the deed shown to the court. And the demandant would have averred his writ, of the demise for life, &c., and it was not permitted, but he was driven to answer the deed. * * * Then it is to be considered here, whether Beamont, who is the tenant, and who is heir to the great-grandfather and his wife, shall be received to aver any other cause, joint or several, to be the consideration of those estates made in use, than is comprised within the indenture of his ancestors? And it seems not; and this for the causes above; but perhaps, if he were a stranger, it would be, &c." Villers v. Beamont, Easter, 3 & 4 Phillip and Mary, A. D. 1557, 2 Dyer 146a, 146b, 147a.

SHARINGTON v. STROTTON, in King's Bench, Mich. term, 7 & 8 Eliz., A. D. 1565—Abridged from Plowden Com. 298-309.

Trespass by Henry Sharington et al. against Thomas Strotton et al., for entering a close at Bremble in Wilts, and cutting and carrying away 200 cart-loads of wood, value 40*l.* The defendants plead that the close was part of the manor of Bremble, and that Andrew Baynton, being seised of the manor in fee, 3d of July, 2 Eliz., by indenture with his brother Edward Baynton, reciting that whereas said Andrew was settled and determined how such lands should be and remain, as well in his life as after his death, and because he was desirous that said lands should remain and descend to the heirs male of his body, and

remain to the blood and name of Baynton, and for the good-will, brotherly love, and favor which he bore for his brother Edward and the others named in the deed, said Andrew covenanted, granted, and agreed, for himself and his heirs, that he and his heirs should from thence stand seised to the use of said Andrew for life, then to the use of said Edward and Agnes his wife for their lives, then to the use of the heirs male of said Andrew lawfully begotten on the body of Frances Lee, then to the use of the heirs male of the body of said Edward, with divers remainders over; that said Andrew afterwards died without issue, and said Edward and Agnes entered in their remainder, and were ejected by the plaintiffs; on whom defendants, as servants of said Edward and Agnes re-entered; which is the trespass complained of. On this plea, plaintiffs demurred. The matter was argued Michaelmas term, 7 & 8 Eliz.

Fleetwood and *Wray* for the plaintiffs. First it is to be considered that Andrew Baynton, at the time of making the indenture, was seised of the said manor in fee-simple, clear of all estates and interests of any stranger therein; and if he intended to make a stranger have a use in it, he ought to have taken one of these two ways to raise such use: The one is, to part with the possession, by the circumstances required by the common law, to the use intended, as to make a feoffment, to levy a fine, or to suffer a recovery of the land to the use intended; and this way the common law is satisfied, as well as the party also who has the use, for the circumstances of the common law are pursued; and the use is no more than a confidence annexed to the estate which the person parts with, and when he parts with the estate by his own consent, he may make it upon confidence, and this way the use is properly made. The other way is, to keep the land in his hands without parting with it, and yet to do such a thing as shall make the possession to be to the use of another, and that cannot be unless the thing done imports in itself a good and sufficient consideration to make the possession be to the use of another, which shall be upon a contract, or upon a covenant, or grant on consideration. As if a man is seized of land in fee, and bargains and sells the land to another on consideration of a certain sum paid to him, or agreed to be paid at a certain day, here is a contract, and the bargainor shall be seized to the use of the bargainee by the course of the common law, because he has done an act upon consideration, that is, he has bargained the land for money: and inasmuch as he hath the money, or security for it, it is reasonable that the bargainee should have something for it, and the land he cannot have as his own, because he had not livery of seizin, and therefore reason has necessarily vested the use in him, which is but a right in conscience to have the profits, and to have the land ordered according to his will (H. 21 Hen. 7, 18b, per Read, J.); and if the bargainor will not permit him so to have it, reason vests in the bargainee a title to compel him by the judge of conscience to do it [P. 32 Hen. 8, Brooke Abr. Conscience 25, and Brooke New Cases, §181]. So it is in the case of a covenant upon consideration.

As if I promise and agree with another that if he will marry my daughter, he shall have my land from thenceforth, and he does so, there he shall have a use in my land, and I shall be seized to his use, because a thing is done whereby I have benefit, *viz.*, the other has married my daughter, whose advancement in the world is a satisfaction and comfort to me, and therefore this is a good consideration to make him have a use in my land [M. 36 Hen. 8, Brooke Abr. t. Feoffments to Use 54]. So that a good consideration is always requisite to create a use *de novo* in the land of another, where there is no transmutation of the possession of the land. Then in our case here, inasmuch as Andrew Baynton was seized of the land in fee-simple, and intended to raise uses in it without any transmutation of the possession, which he cannot do by the course of the common law unless the circumstances pursued in the raising of such uses import a good and sufficient consideration to support the same: for this reason we ought to weigh the considerations here, and see what substance they have in the law. And the *causes contained in the indenture* are three. *First*, a desire which he had that the lands might come, remain, and descend to the heirs males of his body limited in the indenture; *secondly*, his intent that the lands should continue and remain to such of the blood and name of *Baynton* as are named in the indenture; *thirdly*, the good will and brotherly love and favor, which he bore to his brother Edward Baynton and to his other brothers. And these are all the considerations; for the matter in the rehearsal, *viz.*, that the said Andrew had no issue male, and that he was determined and resolved how his [*302] manors and lands should remain and be as well in his lifetime as after his death, is no consideration at all, but the want of issue male is the cause that moved him to resolve, and the resolution is but a demonstration of his mind, and none of them is any consideration, for the considerations are the three before mentioned. And as to the first, *viz.*, his desire that the lands might come to the heirs males of his body, this does not seem to be any consideration to the father, for the father has no gain or advantage by it, but the heirs males of his body. And the consideration ought to be to him that is seized of the land, for if he has no recompence, there is no cause why the use of his land should pass. And none of the considerations contain a recompence here, for the continuance of the land in his blood and name of Baynton is no recompence to him, nor cause worthy to raise a use; no more is the brotherly love and favor which he bore to Edward Baynton or to his other brothers, for although these causes induce affection, yet every affection is not a sufficient cause to alter the use. For if a man grants to J. S. that in consideration of their long acquaintance, or of their great familiarity, or of their being scholars together in their youth, or upon such like considerations, he will stand seized of his land to his use, this will not change the use, for such considerations are not looked upon in the law as worthy to raise a use, because they don't import any value or recompence. For if upon consideration that you are my familiar friend or acquaintance, or my brother, I promise to pay you 20*l.*

at such a day, you shall not have an action upon the case, or an action of debt for it, for it is but a nude and barren contract, *ex et nudo pacto non oritur actio,* and there is no sufficient cause for the payment, nor is anything done or given on the one part, for you were my brother or my acquaintance before, and so will you be afterwards; so that nothing is newly done on the one part, as is requisite in contracts, and also in covenants upon consideration. As if I sell my horse to you for money or other recompence, here is a thing given on both sides, for the one gives the horse, and the other the money or other recompence, and therefore it is a good contract. So is it in the case of a covenant upon consideration, as if I covenant with you, that if you will marry my daughter, you shall have my land, or I shall be seized to your use, here is an act on both parts, for you are to marry my daughter, and for that I grant to you the use; so that there is an act done and a cause arising newly on each part. But in the principal case there is no such thing, for the issue male of Andrew Baynton should have been his issue male, and his name and blood should have been his name and blood, and his brothers should have been his brothers, and fraternal love should have been between them, if this covenant or grant had not been made; so that all this was before the indenture or covenant, and should have been after the time of the indenture or covenant, if the same had not been made. Wherefore no new thing is here done or caused by the one side, and there is no cause here but what would have been if no such covenant or indenture had been made. But the common law requires that there should be a new cause, whereof the country may have intelligence or knowledge for the trial of it, if need be, so that it is necessary for the public-weal. For livery of seizin was first invented as an act of notoriety, whereby people might have knowledge of estates, and be more able to try them, if they should be empannelled on a jury; and by the like reason when a use shall pass, there ought to be, by the common law, a contract, or a public and notorious consideration to a covenant, which may cause the country to have knowledge of the use for the better trial thereof, if it should be necessary. And such was the intention of the parliament in 27 H. 8 [c. 10] when they made the act that the possession should be where the use was. One of the great causes of making which act was to remove ignorance, and that the country might know in whom the estate of the land was. And the like consideration they had in making the act of inrolments [27 H. 8, c. 16], which restrains estates of freehold from passing by bargain and sale, except it be by writing indented enrolled within six months. And if uses might be so easily raised by covenants upon such considerations as these here are, where no act or thing apparent is done whereof the country may have notice, it would destroy the effect of the said statute of uses, and would be pernicious to the public-weal, and make it very difficult for the people to know who were the owners of lands and tenements. And it is to be presumed that the makers of the said act of inrolments did not take the common law to be so, for if they had, they

would have remedied it in this case, as well as they did in the case of a bargain and sale, which is much more notorious than a covenant upon such secret consideration, where no apparent act or thing is done to inform the country of the alteration of the estate in the land; and forasmuch as they did not add any remedy to it, it is an argument that they did not take the law to be that uses might pass upon such covenants without notorious considerations. But if the use had been *in esse,* it might well enough have passed to a stranger by the grant of *cestuy que use* without any consideration, for the *cestuy que use* may as well give or grant his use without consideration as he may his horse or other chattel. [Dr. & Stud. lib. 2, cap. 22, fo. 185; lib. 2, cap. 23, fo. 187, 188; 2 Finch 34], and he may also devise it [Godolph. Orph. Leg. 391, §2]; but to create it *de novo* out of the land cannot be done without good consideration. And to this purpose they alleged the opinions of *Read* and *Tremail,* two of the justices of the king's bench, in the case of an office traversed in 21 H. 7, and the case there put by *Read* [H. 21, H. 7, 18, 19, Bro. Feoffments al Uses 16. Crompt, J. C. 62 b.], fo. 19, was also cited, viz., it was covenanted by indenture between Sir John Mordant and his wife and one T, that the said T should have the land to him and to his heirs of his body, and that for default of such issue, the lands should remain to Sir John Mordant and his wife in fee, and it was adjudged that he should not have any use by force of the indenture, as it is there rehearsed by *Read,* but they were put to their action of covenant. So here no use shall be raised upon these considerations, for they are utterly [*303] ineffectual to such purpose, and then if no use could be raised by the common law, from thence it follows that the statute does not execute any possession here, for it executes no possession but where there was a use before; for which reason the bar is not good, but the plaintiffs shall recover. And many other things were said, and many cases put to enforce this argument, which I have omitted, my design being only to show briefly the principal reasons thereof.

On the contrary, Thomas Bromley and the said apprentice argued for the defendants. And first they admitted that if a man who is seized of land has a mind to raise a use in it without any transmutation of the possession, there are two ways by the common law to do it, viz., by bargain and sale, or by covenant upon consideration. For the statute of 27 H. 8, cap. 10, for executing the possession according to the use, says in the purview, *where any person stands seized of any lands, &c., by any bargain, sale, covenant, agreement, &c., the person who has the use shall be seized of the land.* So that by the intent of the makers of the act a man might be seized by bargain and sale, or by covenant or agreement. And a bargain and sale is, when a recompence is given by both the parties; as if a man bargains his land to another for money, here the land is a recompence to the one for the money, and the money is a recompence to the other for the land, and this is properly a bargain and sale. But here there is no such bargain and sale, nor such recom-

pence given on both sides, and therefore we have no need to dispute upon this point. The other is the covenant or agreement, and this is to be intended in every case upon consideration. But this consideration may arise on the one side only, and it is not requisite to have a consideration and a new act done by both parties; and such consideration ought to be sufficient. And therefore, they said, the considerations are to be weighed. And hereupon the apprentice divided the matter into two distinct points. First, whether the grant and agreement upon these considerations (admitting it had been without deed or writing) had been sufficient to raise the uses according to the agreement or not. Secondly, admitting the considerations to be insufficient if they had been without deed, or admitting that there were no considerations at all, if nevertheless the uses shall be raised here, inasmuch as the agreement thereunto is by deed.

And as to the first point, which contains the considerations, he said that the considerations are in number four, and each of them is several, and he made several points of them, and argued to them severally. The first is, the affection of the said Andrew Baynton for his heirs males which he should beget on the body of Frances Lee, and his provision in the estate made for their security accordingly. For the deed is recited to contain these words, *the same Andrew Baynton as well for the causes aforesaid, as for, &c.*; so that some of the considerations precede the *as well* and some follow the *as also;* and the first of them which precede the *as well* is the consideration for the issues males begotten by him upon Frances Lee, and their security made by the limitation of the estate accordingly. And it was said, this cause proceeds from nature, for when God had first created man and woman, and other living creatures, he said to them, *increase and multiply,* and the way to increase and multiply is by procreation, and therefore when he said increase and multiply, he intended it to be by procreation, and he was willing it should be done, and for that purpose he instilled into mankind an appetite for procreation, which instinct is nature in them, and the appetite for the same is natural; so that to beget is natural, and the end of it is to have issues, and the having issue is the continuance of the people, for otherwise the world would be at an end. But all procreation is not lawful, only that which is by marriage. And matrimony is ordained by God, and limited to rational creatures to beget and procreate issues; so that matrimony is the means of procreation, to which nature urges us. * * * And this point of nature has another point of nature joined with it, and that is, when the thing like itself is begotten, to nourish it. For it would be in vain to beget a thing, and to suffer it to perish, for then nature loses its effect; and the appetite of procreation is not without its end and design, which is, to bring to perfection the thing begotten, and to leave it alive after him that begot it. And for this purpose nature has instilled in the sire a love for the thing begotten which urges him to take care of the education and nurture of it, and to provide it with everything that is necessary,

and to defend it against all dangers, * * * [*304] * * *. From whence it is evident that to beget is natural, and to preserve the thing begotten, and to provide everything necessary for its support, is also natural. Then let us consider the parts hereof in our case. Andrew Baynton recited that he was desirous that the tenements and hereditaments whereof he was seized (part of which are now in question) might come and descend to the heirs males of his body begotten, in manner and form in the said indenture expressed, and for this cause he covenanted and granted to stand seized of the same lands to the use of himself for life, and afterwards to the use of Edward Baynton and Agnes his wife for their lives, and afterwards to the use of the heirs males of the said Andrew lawfully begotten or to be begotten on the body of Frances Lee. Here this consideration recited, and the limitation of the estate accordingly, is founded purely on the said principles of nature, viz., of begetting and procreating a thing like unto himself, and also of providing for its sustenance, education, and living afterwards. For the tail limited to Andrew Baynton shall in all probability descend to the issue, and it is an inheritance certainly made and appointed for the benefit and advancement of the issues males of the body of Andrew only, and of none other. * * *

The second consideration is the continuance of the land in the name of *Baynton,* and this seems to be a good consideration to raise a use. For by the continuance of it in the name of Baynton he intended to exclude all females from inheriting the land, and to place it in the heirs males. * * *

The third consideration here is, the brotherly love, and continuance of the land in such of the blood of the said Andrew as are mentioned in the indenture, viz., his brothers, for this is but one consideration, that is, the blood, and the brother is one of the next degrees of the blood, after his parents and issues. And as to this consideration, viz., the continuance of the land in his brothers and others of his blood, it is also founded upon nature. For those who descend from one same parentage, are joined nearest in blood, are by nature joined in love. And the founders of our law knowing this have pursued the same, and in respect thereof have established divers maxims and laws. * * * [*307] * * *

The fourth consideration is the marriage had between Edward Baynton and Agnes his wife; for the use is limited after the death of Andrew to Edward Baynton and Agnes his wife for term of their lives. In which words *his wife* it is implied that marriage was before had between Edward Baynton and the same Agnes, for without marriage she could not be his wife. And then none of the considerations specified before the estate limited serve as an inducement to the estate of Agnes but one, and one does, which is, the good will and brotherly love which Andrew bore to the said Edward Baynton. So that the whole being put together, the sense is, that Andrew Baynton, in consideration of the good will and brotherly love which he bore to Edward Baynton his brother, covenanted to stand seized to the use of himself for his life, and

afterwards to the use of the said Edward and Agnes his wife, whom he had before married. * * *

And thus the four considerations and the efficacy of them are disclosed, which are greater than any money or matter of recompence, and the more so, in that some of them are founded merely upon nature, *et naturae vis maxima,* and some of them are founded upon other causes of great importance, and each of them alone by itself is sufficient to raise the uses, and when they are all put together, they are of greater force, *nam omnis vis unita fortior est.* So that the uses are here raised by these considerations, and then the Statute of Uses executes the possession accordingly without inrolment of the deed within six months. For the act of inrolments extends only to bargains and sales, whereas this is no bargain and sale, as it is before granted, but a covenant and grant upon consideration, which is out of the statute of inrolments, for which reason the possession is executed according to the limitation of the uses. And therefore Agnes shall have a joint estate with Edward, and the defendants as servants to them both, and by their command, have well justified the trespass. * * * [*308] * * *

Then as to the second point, admitting the considerations to be insufficient, or admitting that no considerations had been expressed, yet the covenant of itself without consideration is sufficient to raise the uses. * * * Then when Andrew Baynton had the land to his own use, and made an indenture between him and Edward Baynton, that from thenceforth he should be seized of it to other uses, here is a sufficient consideration why the same should be done, viz., the will of him that has the thing, and greater than this there is no consideration. And, sir, by the law of this land there are two ways of making contracts or agreements for lands or chattels. The one is, by words, which is the inferior method; the other is by writing, which is the superior. And because words are oftentimes spoken by men unadvisedly and without deliberation, the law has provided that a contract by words shall not bind without consideration. As if I promise to give you 20*l.* to make your sale *de novo,* here you shall not have an action against me for the 20*l.* as it is affirmed in the said case in T. 17 *Ed.* 4 [4b, 5a], for it is a nude pact, *et ex nudo pacto non oritur actio.* And the reason is, because it is by words which pass from men lightly and inconsiderately, but where the agreement is by deed, there is more time for deliberation. For when a man passes a thing by deed, first there is the determination of the mind to do it, and upon that he causes it to be written, which is one part of deliberation, and afterwards he puts his seal to it, which is another part of deliberation, and lastly he delivers the writing as his deed, which is the consummation of his resolution; and by the delivery of the deed from him that makes it to him to whom it is made, he gives his assent to part with the thing contained in the deed to him to whom he delivers the deed, and this delivery is as a ceremony in law, signifying fully his good-will that the thing in the deed should pass from him to the other. So that there is great deliberation used in the

making of deeds, for which reason they are received as a *lien* final to the party, and are adjudged to bind the party without examining upon what cause or consideration they were made. And therefore in the case put in 17 *Ed.* 4, put it [*309] thus, that I by deed promise to give you 20*l.* to make your sale *de novo,* here you shall have an action of debt upon this deed, and the consideration is not examinable, for in the deed there is a sufficient consideration, viz., the will of the party that made the deed. * * * So that where it is by deed, the cause or consideration is not enquirable, nor is it to be weighed, but the party ought only to answer to the deed, and if he confesses it to be his deed, he shall be bound, for every deed imports in itself a consideration, viz., the will of him that made it, and therefore where the agreement is by deed, it shall never be called a *nudum pactum.* And in an action of debt upon an obligation, the consideration upon which the party made the deed is not to be enquired, for it is sufficient to say that it was his will to make the deed. And so inasmuch as in the principal case it is agreed that the uses might be raised by the deed, if there had been a consideration in it, and here there is a consideration contained in the deed, viz., the will of Andrew Baynton, which is sufficient of itself, for this reason the uses shall be raised thereby; and if this should not be sufficient to raise them, yet they should have been raised by other considerations if they had been without deed, whereas here they are by deed, and so they shall be raised *a fortiori.* For which reasons they prayed judgment that the plaintiffs might be barred. And many other things were said, and cases put to enforce these arguments.

And after these arguments the court took time to deliberate until Hilary term, and from thence until Easter term, and from thence until this present Trinity term, * * * and the defendants now prayed judgment. * * * And afterwards at another day, CATLINE, chief justice, being present, the apprentice prayed judgment. And CATLINE and the court were agreed that judgment should be entered against the plaintiffs, and he ordered Haywood the prothonotary to enter it. And the apprentice said, *May it please your lordship to show us, for our learning, the causes of your judgment?* And CATLINE said, It seems to us that the affection of the said Andrew for the provision of the heirs males which he should beget, and his desire that the land should continue in the blood and name of *Baynton,* and the brotherly love which he bore to his brothers, are sufficient considerations to raise the uses in the land. And where you said in your argument *naturæ vis maxima,* I say, *natura bis maxima,* and it is the greatest consideration that can be to raise a use. But as to the other consideration moved in the argument, viz., of the marriage had between Edward Baynton and Agnes, the record does not prove this, nor is it so averred, and it shall not be so intended, and therefore I don't regard it; but the other causes and considerations are effectual, and those which moved us to our judgment. Wherefore judgment was given as follows: [Here follows the record of judgment for defendants.]

MILDMAY'S CASE, in Court of Wards, Hilary, 24 Eliz.; in Common Pleas, Hilary, 26 Eliz.; in King's Bench, Mich. 26 & 27 Eliz., A. D. 1585—1 Coke 175, Cro. Eliz. 34, Moore 144, 632, Jenk Cent. 247, 1 Gray P. C. 498. Given according to 1 Coke 175a—177b.

The case in an information exhibited in the court of wards by Richard Kingsmill, Esq., attorney of the same court, against the lady Anne Sharington, late wife of Sir Hen. Sharington, Knt., and John Talbot, Esq., and Oliff his wife, one of the daughters and heirs of the said Sir Henry Sharington, which was resolved Hil. 24 Eliz. and afterwards Hil. 26 Eliz., adjudged in the court of common pleas, rot. 745, between Anthony Mildway, Esq., plaintiff, and Roger Standish, Gent., defendant, in an action upon the case for slandering his title, &c., which judgment was M. 26 & 27 Eliz., rot. 35, affirmed in the king's bench, in a writ of error, and was in effect thus: The said Sir Henry Sharington having a wife the said Dame Anne, and three daughters, Grace married to the said Anthony Mildmay, Ursula married to Thomas Sadler, Esq., and Oliff married to the said John Talbot, by indenture bearing date 20 August, 15 Eliz., made between the said Sir Henry Sharington of the one part, and Edmund Pirton and James Paget, Esqrs., of the other part, in consideration of a jointure for his wife, for the advancement of his issue male of his body, if he should have any, and for the advancement of his said three daughters and the heirs of their bodies, if he should have no heir male of his body, and for the continuance of his land in his blood, and for other good and just considerations did covenant to stand seised of six hundred acres of land *(exempli gratia)* to the uses, intents, and purposes, and under the proviso following, *scil.* of all to the use of himself for his life, and after for 300 acres of land, in certain, to the use of his wife for her life for her jointure; and of the other 300 acres after his death, and of the said 300 acres limited for the jointure of the wife after their deaths to the use of the heirs males of his body begotten; and for the default of such issue, then for the 300 acres not being limited for jointure, &c., to the use of his three daughters severally by themselves, and to the heirs of their bodies; and for default of such issue, to the use of the right heirs of the said Sir Henry, with like limitation of the other 300 acres to them of the like estate, with the reversion to his right heirs. And if any of his said three daughters should die without issue, then her portion should be by moieties to the survivors of the like estate, *ut supra,* with remainder *ut supra;* with proviso for the three several husbands of the said three daughters to have several portions for their lives, if they should survive their wives, and should not be entitled to be tenants by the curtesy, with this proviso in these words following, *scil.* Provided always, and it is covenanted and agreed between all the said parties, that it shall be lawful for the said Sir Henry by his will in writing to limit any part of the said lands to any person or persons for any life, lives, or years, for the payment of his debts, performing of his legacies, preferment of his servants, or any other reasonable considerations as to

him shall be thought good, and all persons thereof seised, to stand seised thereof to the use of such persons and for such interests as shall be so limited by his will. After which the said Ursula died without issue, Grace and Oliff surviving, whereby her portion by moieties came to them: and afterwards the said Sir Henry by his will in writing for the advancement of his daughter Oliff, and of her husband, and of the heirs of the body of the said Oliff, limited a great part, limited by the indenture for the portion of Grace, after the death of his wife, and another great part of land which remained to her by the death of the said Ursula, to the said Oliff and her husband, and to the heirs of the body of Oliff for 1000 years without reservation of any rent; and afterwards the said Sir Henry died without issue male, and whether this limitation for 1000 years being made for the advancement of his daughter Oliff and her husband, and the heirs of the body of the said Oliff, be good in law by force of the said proviso, was the question. And it was resolved and adjudged by Sir Christopher WRAY, Ch. Just. of England, Sir Edm. ANDERSON, Ch. Just. of the court of common pleas, and all the Judges of England, that the limitation for 1000 years was void, and not warranted by the said proviso; and in this case five points were resolved.

First, that an use cannot be raised by any covenant or proviso, or by bargain and sale upon a general consideration: and therefore, if a man by deed indented and enrolled according to the statute for divers good considerations bargains and sells his lands to another and his heirs, *nihil operatur inde;* for no use shall be raised upon such general consideration, for it doth not appear to the court that the bargainor hath *quid pro quo,* and the court ought to judge whether the consideration be sufficient or not; and that cannot be when it is alleged in such generality. But note, reader, the bargainee in such case may aver that money or other valuable consideration was paid or given, and if the truth be such, the bargain and sale shall be good. So if I by deed covenant with J. S. for divers good considerations, that I and my heirs will stand seised to the use of him and his heirs, no use without a special averment shall be raised by it; but if J. S. be of my blood, and in truth the covenant was made for the advancement of his blood, he may aver that the covenant was in consideration thereof; for in both these cases the person who shall take the use is certain; and that such averment may be taken which stands with the deed, although it be not expressly comprised in the deed, is proved by a case adjudged in an assise between *Villers* and *Beamont,* term. Pasch. 3 & 4 Ph. & M. reported by Bendloes [Br. N. C. 182, 2 Anders. 47, N. Ben. 39], serjeant at law; which case you will find also Pasch. 3 & 4 Ph. & M. Dyer, fo. 146, where the case in effect was, that George Beamont and Jane his wife, as in the right of his wife, was seised of the manor of Northall, &c., and had issue Will. Beamont, who had issue Rich. Beamont, and he and his wife, by indenture 12 H. 8, between them of the one part, and Rich. Clark of the other part, in consideration of 70*l.* given by Rd. Clark, did bargain and sell the land to the said Rich. Clark for 30 years, the remainder to themselves

for their lives, the remainder to Will. Beamont for life, the remainder to Rich. Beamont and to one Collet the daughter of Rd. Clark in tail, &c., and afterwards a recovery was had to the same uses; Rd. Beamont and Collet did intermarry; and it was found and averred, that the said indenture was made, and the said recovery had *tam in consideratione maritagii præd' intr Rich' Beamont & Colletam, habend' & celebrand'* (to make it a jointure within the statute of 11 Hen. 7) [c. 20] *quam* of the said sum of 70*l.* and it was adjudged, that although there was a particular consideration mentioned in the deed, yet an averment in the same case might be made of another consideration which stood with the indenture, and which was not contrary to it; *a fortiori* in the said cases, for in the deed there is no certain consideration, but the deed is general for divers good considerations then the averment that the bargainee gave money, &c., or that the covenantee was of his blood, is but an explanation and particularising of the general words of the deed, which include every manner of consideration, and in all the said cases the matter so averred is traversable and issuable.

Secondly, it was resolved, that when uses are raised by covenant in consideration of paternal love, &c., to his sons and daughters, or for the advancement of any of his blood; and after in the same indenture a proviso is added, that the covenantor for divers good considerations may make leases for years, &c., that the covenantor in such case cannot make a lease for years to his son or daughter, or to any other of his blood (much less to any other person) because the power to make leases for years was void when the indenture was sealed and delivered; for the covenant upon such general consideration cannot raise the use for the causes aforesaid and no particular averment can be taken because his intent was as general as the consideration was, and his intent was not at the time of the delivery of the deed to demise to any person in certain, to one more than another, but to demise generally to whom he pleased: and therefore his power to make leases (the uses being created and raised by covenant upon the considerations aforesaid) was void *ab initio.* But if the uses had been limited upon a recovery, fine or feoffment, in that case there needs not any consideration to raise any of the uses, and so a manifest difference. And the case at bar is stronger, because the proviso which gave power to make leases will defeat or at least incumber the estates vested and settled upon good considerations in strangers by the covenants of the same indenture. So note a difference when the consideration is general, and the covenant or bargain made with a person certain, there an averment according to the truth of the case may be taken as aforesaid; but when the consideration is general, and the person uncertain, there no averment can help; and therefore if I for divers good considerations covenant with you, that I will stand seised to the use of such a one as you shall name, now although you name my son, or my cousin, yet no use shall be raised thereby, because, for the generality and incertainty, it was void *in initio,* and never could be made good to any purpose after; and no averment can make it good,

or reduce it to any certainty, for the intent of the covenantor was as general as his words were. But if I covenant with you that in consideration of fatherly love, or for the advancement of my blood, I will stand seised to the use of such of my sons, or to the use of such of my cousins as you shall name, upon the nomination made the use shall be raised, for there the consideration is particular and certain, and the person by matter *ex post facto* may be made certain.

3. Upon these words in the proviso (other considerations) it was held, that this word (other) could not comprehend any consideration mentioned or expressed in the indentures before the proviso; for (other) ought to be other in nature, quality, and person, and the advancement of his daughter is the consideration mentioned before.

4. It was resolved, that the said limitation of 1000 years was as well against the intent of the parties, as against the words of the proviso, for the intent and scope of the indentures was to make distribution of his lands amongst his three daughters, and the heirs of their bodies; and every of them, upon good consideration and by agreement between their parents, had her portion by herself; but if this limitation of 1000 years should be good, it would rather frustrate the estate of the other sister, and defraud the intent of the parties grounded upon a consideration of marriage, than perform and pursue the intent and meaning of the proviso, for the intent of the proviso was never to give any power to make void the estates of the other sisters: but it appears by all the parts of the indenture, that each daughter should be advanced equally; and so this limitation for 1000 years without any rent reserved was against the intent and meaning of the parties; it seems also to be against the words of the proviso, for that cannot be called a reasonable consideration which tends to the subversion of the estates vested and settled by the said indentures upon so good and just considerations against the meaning of the parties.

After the said resolution of the justices certified into the court of wards, it was adjudged in the common pleas, and also affirmed upon a writ of error in the king's bench in an action upon the case brought by the said Anthony Mildmay against Roger Standish, because the said Roger had said, and openly published that the said land was lawfully assured to the said John Talbot and Oliffe his wife for 1000 years, and that they were lawfully possessed of the interest of the said term, whereas, in truth the said land was not lawfully assured for the term aforesaid nor were the said John Talbot and Oliffe lawfully possessed of the interest thereof, and so for slandering of the estate and title which was conveyed to his wife by the said indentures, and showed all in certainty, and how he was prejudiced by the said words, he brought the said action. And Standish pleaded the said proviso in the same indentures, and the said limitation for 1000 years by the said will, &c., according to the said proviso (as he pretended) by virtue whereof he said the said Oliffe had an interest for 1000 years, and justified the words upon which the plaintiff demurred. And it was adjudged, that the action upon the

case was maintainable: and in this case two points were resolved in both the courts: first, that the said lease for the causes aforesaid was void in law. Secondly, although *de facto* the said John Talbot and Oliffe had a limitation of the land by the said will of Sir Henry Sherington in writing for 1000 years, which was the occasion that Standish, being a man not learned in the law, did affirm and publish that Oliffe had a term for 1000 years; yet forasmuch as he hath taken upon him the knowledge of the law, and meddling with a matter which did not concern him, had published and declared, that Oliffe had a good estate for 1000 years, in slander of the title of Mildmay, and thereby had prejudiced the plaintiff, as appears by the plaintiff's declaration; for this reason the judgment given for the plaintiff was affirmed in the writ of error; *et ignorantia juris non excusat.*

TAYLOR v. VALE, in Queen's Bench, 32 Eliz., A. D. 1591—Cro. Eliz. 166.

Replevin. The case was upon demurrer. Vale having a rent charge in fee, by indenture, which was inrolled within six months, giveth and granteth it to Hall in fee, and there was no attornment. NOTE. In truth the case was that he for a certain sum of money giveth, granteth, and selleth the rent; but it was pleaded only that he by indenture *dedit et concessit.* And it was ruled without argument that the rent without attornment passeth not, being only by way of grant, and not of bargain or sale, although the deed was inrolled. But WRAY [C. J.] said that if by indenture, in consideration of a certain sum of money, *dedit et concessit* and the deed is inrolled, this shall pass the rent without attornment, though there be no words of bargain and sale. And the plaintiff had judgment.

WARD v. LAMBERT, in Common Bench, Hilary term, 35 Eliz., A. D. 1594—Cro. Eliz. 394.

Upon a special verdict the case was that one by indenture, reciting, "That whereas J. S. was bound in a recognizance and other bonds for him; now he, for divers good considerations, bargained and sold the land to him and his heirs." The deed was enrolled within the six months, but it was found there was not any part paid; and whether this was a good bargain and sale or not was the question upon demurrer.

ANDERSON [C. J.]: Every owner of land may part with it as he pleases, if it be according to law; and here it is not shown that the bargain and sale was because the vendee was bound to him; and if he were, yet it cannot be a good bargain and sale. But if there had been apt words, he might thereby have raised an use by way of covenant, but clearly not a bargain and sale.

WALMSLEY [J.]: Accord. In every bargain and sale there ought to be a *quid pro quo.* But the vendor here hath nothing for his land, and therefore it is void. But it might have arisen by way of covenant; but there ought to have been apt words, viz., a covenant to stand seised

to uses; for if I give land, or bargain or sell land to my son, no use ariseth thereby.

And to that opinion the other justices inclined, that it is not good by way of bargain and sale, but that it had been a good consideration to raise an use by way of covenant. Wherefore it was adjudged accordingly.

WHITMAN v. CORLEY, in S. Car. Sup. Ct., Oct. 7, 1905—72 S. Car. 410, 52 S. E. 49.

WOODS, J. The complaint alleges the conveyance by the plaintiff to defendant of a tract of land in consideration of a promise of future support, and the failure of the defendant to perform his agreement. The answer denies the promise and alleges the conveyance was made in consideration of the sum of $200 actually paid. The plaintiff recovered judgment and the defendant appeals. The deed was introduced, and was found to express only a consideration of $200. The plaintiff was then allowed to introduce evidence to the effect that the real consideration was, not the payment of $200, but the promise of support set out in the complaint. This evidence was objected to as an attempt to vary the terms of a written instrument by parol, and the alleged error in its admission is the basis of this appeal. The case of *Latimer* v. *Latimer,* 53 S. Car. 483, 31 S. E. 304, is authority for the proposition stated in the syllabus: "Except in cases of fraud, it is not competent to show by parol that a deed, purporting to be based on good consideration and executed for a specific purpose, was based on valuable consideration and executed for an entirely different purpose." But that case recognizes and affirms the rule that, where a deed expresses a consideration, an additional or a different valuable consideration may be proved by parol. * * *

Judgment affirmed.

CHAPTER VI.

POWERS.

LITTLETON'S TENURES, § 169. (Littleton died in 1482.)

Also by such custom a man may devise by his will that his executors may alien and sell the tenements that he has in fee simple, for a certain sum in money to distribute for his soul. In this case, though the devisor die seized of the tenements, and the tenements descend to his heir, yet the executors, after the death of the testator, may sell the tenements so devised to them, and put out the heir, and thereof make a feoffment, alienation, and estate, by deed or without deed, to them to whom the sale is made. And so you may here see a case where a man may make a lawful estate and yet has nothing in the tenements at the time of the estate made. And the cause is that the custom and usage is so; for a custom used on a certain reasonable cause displaces the common law.

FARINGTON v. DARREL, Trinity, 9 Hen. VI, A. D. 1431—Yearbook, 9 Hen. VI, 23b.

John Farington brought a writ of trespass for breaking his close in London against John Darrel. *Newton:* The action does not lie: for we tell you that before the day of the alleged trespass, one R was seized of a house with the appurtenances in London in his demesne as of fee; and the city of London is an ancient borough, and by the custom of the city at the time, &c., whoever has an inheritance by descent or purchase may devise it; and the said R being so seized, by his will probated in the hustings of London common pleas, devised said house to one L, his wife, for the term of her life, and that after her death the said house and appurtenances should remain to his son J and his heirs males of his body, and for default of issue said house should remain to the heir male of said R and the heirs males of the body of said heir, &c.; and the said R died, after whose death said L his wife entered said house and died seized without issue male; after whose death one P. G., and Joan, his wife, in the right of the wife as grand-daughter and heir of said R, viz., the daughter of one J, daughter of said R in said house then had issue a son called E; and afterwards said P. G. and J his wife, by their deed enrolled in the hustings of London such a day and year gave the said house in fee to said John Farington; and later the said E, son of the said Joan, in the said house as next heir male of said R, &c., entered on the said John Farington, which estate the said John Darrel had and before the day of the trespass alleged; on whom the

said John Farington entered, and the said John Darrel at the time alleged re-entered as he well might; on which the said action was conceived. *Rolf:* On his own admission we are entitled to our damages. *Newton:* On these facts you should be barred. And so the case was submitted to the judges at the trinity term 8 Hen. VI, and adjourned from term to term till now; on which day *Rolf* said: It seems to me that the plaintiff should have his damages; for it is admitted that at the time of the devise and when the remainder fell due the devisor had no heir male; and this E who claims as heir male was born after the remainder accrued, so that the remainder is void. For if land is given to a man for term of life, the remainder to the right heirs of my Lord Babington, and afterwards the tenant for life die in the life of my Lord Babington, this remainder is void, because Babington cannot have heirs while he lives. In the same manner here, it is not alleged that Joan, who was grand-daughter and heir of R, was dead at the time that the remainder accrued; wherefore, &c., and thus I understand that an estate tail or a remainder is merely void and cannot be revived afterwards. If land is given to a man and the heirs males of his body and he has a daughter and dies without heir male, and the donor enters, and later the daughter has issue male and dies, her issue male shall not have the land, and yet he is now heir male of the body of the donee, &c., so here. * * * FULTHORP: A devise is stronger than a grant at common law; for everyone is held to perform the last will; then in this case the said E is heir male of said donee by force of the gift; and if one devise or grant that his executors may sell his land after his death, if the land is not devised all is void; for it is against common reason that any executor may sell that in which he has nothing; but by the custom it may well be, and he may sell and put the vendee in possession though the heir is in by descent; so that a devise is stronger than a grant; wherefore it seems to me that the intent should be executed as this may be executed. And as to what is said to the point that this reversion is merely void, because there was no one to take as heir male at the time the remainder fell due, if one should be seized in fee simple or fee tail and die without heir except that his wife was enceinte, and the lord or the donor should enter, and afterwards the wife should have issue, the issue should have the land; and yet at the time of his death he had not any issue nor heir; wherefore in the same manner here. ELDERKAR: This remainder was determined at one time, as has been said, and cannot be revived; and if one devise that his executors shall sell his land to him who will pay the most for the land, and they sell the land to a man, and later another comes to them and offers more, they cannot sell the land to him, for their power is then determined. And, sir, I hold that if land is given to a man for term of life, the remainder to the right heirs female of a stranger who is dead and had issue a son and a daughter, and the tenant for life die, the daughter of the stranger shall not have the land, for she is not right heir of the stranger; and so here. PASTON: I know well that the custom of

devises is that the executors may sell, and that it shall be effectual by the devise, and yet the executors have nothing in the freehold; but the custom of devises is not to make a man to inherit as heir who is not heir. And also it would be inconvenient that when an estate tail had been merely defeated for more than a year and a day it should revive by the birth of one ten years after. And, sir, in many cases, notwithstanding that one has issue male, yet he shall not inherit by force of the gift; as if land is given to a man and to the heirs males of his body, who has a son and daughter and dies, the son enters, the daughter has issue a son and dies, and later the son of the donee dies without issue, the son of the daughter shall not have the land, and yet he is heir male of the donee and of his body. (Which was conceded by all except MARTIN.) As to the statement that if one die without heir except that his wife is enceinte, and later she has issue, his issue shall have the land, and yet he was dead without issue at one time; it is true that he shall inherit, for in this case the inheritance was not absolutely determined; for though he had no visible heir on earth, yet he had an heir in being at the time of his death, though not then born, and in this case the heir may be vouched while *en ventra sa mere*. MARTIN: It has been held that if land is given to a man for life, the remainder to the right heirs of A, and A is in full life, and later A has issue and dies, and later the tenant for life dies, the heir of A shall have the land, and yet at the time of the grant the remainder was in a sense void. (Which was not denied; but PASTON said it was not reasonable.) * * * MARTIN: In a stronger case it has been held that if one devise that his executor or the executor of his executor may sell his land, and at the time of this devise the executor of the executor was not in existence, yet his sale has been held good and sufficient. PASTON: That may well be, for he was in existence at the death of the first executor. * * * GODRED: A devise is stronger than a grant by deed; for if one lease land by deed to a man in possession (who has no capacity) for term of life, the remainder over in fee, or land is leased for term of life to a man who does not exist, the remainder over in fee; this remainder is void for lack of support; but if one devise to one who has no capacity, or to a man who does not exist, for term of life, the remainder over in fee, yet the remainder over is good. So in this case, notwithstanding this would perhaps be void by deed, yet by devise it is good. BABINGTON: The nature of a devise where lands are devisable is that one may devise that the land shall be sold by his executors, and this is good, as has been said, and is marvelous law in reason; but this is the nature of a devise, and devises have been used at all times in this form; and so one may have lawful freehold from another who had nothing, just as one may have fire from flint and yet there is no fire in the flint; and this is to perform the last will of the devisor. And also a guardian in chivalry may endow a widow, and a writ of dower lies against him, and yet he has no freehold. But I hold that a devise ought to be good and effectual at the death of the devisor or it is void; for if it should be

void at his death it may not be effectual afterwards. As if one devise land to his priest for a chantry or for a college in the church at A and die, at which time there is no chantry nor any college, this devise is void notwithstanding it be by the king's license; and if afterwards a chantry or a college is made in the same place, yet they shall not have the land, because at the time of the devise there was no corporation in which the devise might take effect. PASTON: A devise is marvelous in the way it may take effect; for if one devises in London that his executors shall sell his land and dies seized, his heir is in by descent, and yet by the sale of the executors he shall be ousted, and in the same manner his heir after him. But if one devise his lands to his executors so that the freehold is in them by the devise, and afterwards the heir of the devisor abate and die seized and his heir is in by descent, in this case the executors may not oust him that is in by descent. * * * See more of this case at Mich. term, 11 Hen. VI, fo. 12. [At which time the case was further discussed by the judges and again adjourned without decision, and we find nothing more concerning it.]

This case is exceedingly interesting and instructive in many ways; not by reason of what is decided, for nothing is decided, but because of what is admitted, taken for granted, and said by way of argument. Observe that this is an action in a law court, and that what is said concerning powers recognizes them as legal institutions, then well established and understood, creating legal rights in no way depending on uses or the liberal rules of the chancery for their validity and effect. That powers are here recognized as existing and valid before the statute and apart from uses, should assist us to escape the common error of assuming that powers concerning land derive their origin from uses, and their effect in the law courts from the statute of uses.

Unlike a reservation (which could only be made to the grantor and his heirs), of a rent, a profit, an easement, a condition subsequent, or a power of defeasance, these powers of revocation, appointment, and sale, are given (without estate in the land) to others, and yet are admittedly valid.

The power might be devised without devising the land if the land were devisable; and since the land descends to the heir in the meantime, we will later see in this arrangement the forerunner and justification of the executory devise, springing use, and shifting use, which obtained recognition in the law courts after the statute of uses and the statutes of wills. We will later observe that the doctrine recognized in this case that the contingent estate may vest at any time before the termination of the particular estate, and then must come to possession or fail forever, is older than many have supposed. On the facts of this particular case it is remarkable that no one suggested that one could not make an estate to his own heir, or heir of his body, as a purchaser, a doctrine established at least as early as Abel's case, ante —, over a hundred years before.

"Powers are either common-law authorities; declarations or directions operating only on the conscience of the persons in whom the legal interest is vested; or declarations or directions deriving their effect from the statute of uses. A power given by a will to A to sell an estate, and a power given by an act of parliament to sell estates, as in the instance of land-tax redemption acts, are both common law authorities. The estate passes by force of the will, or act of parliament, and the person who executes the power merely nominates the party to take the estate. A power of attorney is also a common-law authority; but the estate is not in this, as in the other cases, transferred by the instrument creating the power." Sugden on Powers, c. 1, §1.

ANON. in King's Bench, Easter term, 9 Hen. VII, A. D. 1494—Y. B. 9 H. 7, 26, pl. 13.

Mordant asked of BRIAN and his companions this question in the king's bench: A man had feoffees to his use and made feoffment to a stranger, and afterwards made a letter of attorney to deliver seizin to the stranger, and so he made it: now if by this livery and seizin taken by the stranger it was a good feoffment, or whether it was a disseizin of the feoffees, or whether he had it at will, or not? But some of them said that this was a good feoffment, because he had authority to enter and make feoffment, so he may cause another to make livery; for he who acts through another is considered to act himself. But BRIAN [C. J.] and all the other justices said that this is a disseizin of the feoffees; for immediately after that *cestuy que use* had sold or bargained his use to a stranger, then he had no right to meddle with the land. But in the way he was seized of the land before any bargain or sale he may not give license to any stranger to enter in the land, or make any trespass on it; and also the feoffees might punish *cestuy que use* if he comes on the land, and he had nothing to do with the land if not by the express words of the statute, viz., to enter and make feoffment; and if he should enter on the land and remain there himself the feoffees would have an assize against him. But as his interest is defined and given by the statute he ought to pursue the authority that is given to him by the statute; and this authority is that he may give to another; but all leases, grants, and recognizances made by him bind the feoffees because the statute warrants these. As if a man has feoffees to his use and he makes his will that his executors or that one John of Down sell his lands; in this case neither the executors nor John of Down may enter in the land and make feoffment, because the statute does not authorize them to do so, but *cestuy que use* himself. But the executors may bargain and sell the use to another, and the vendee may enter and make feoffment in fee to his own use, because the statute warrants this. But the statute does not say that a stranger may enter and give livery, but *cestuy que use* himself. Which was agreed by all the justices.

But see Kellet v. Bishop of London, *post*, —, which overrules this case as to the delegation of a power.

ANON, in Exchequer Chamber, by all the Judges of England, 13 Hen. 7, A. D. 1498—4 Jenk. Cent. case 75.

A devises land to be sold by his executors; A dies seised; the heir of A or a disseisor enters; and the heir or disseisor makes a feoffment of this land to B. B dies seised, and his heir is in by descent. Yet the executors may enter into this land and sell it; for a descent takes away rights of entry not titles or powers, as entry for a condition broken, [or] entry for mortmain. Neither does it take away in the case of a devisee or patentee of land, where an abator enters before them, and dies seised; for they have no other remedy. And executors have only a power,

and when they sell the vendee is in by the will of the devisor, paramount the descent.

ANON., in King's Bench, Trinity term, 14 Hen. VII, pl. 10, A. D. 1499.

In the king's bench the case was such: A man had certain feoffees in his land to his use, and made his will, and willed that his land should be sold after the death of one A, whom he wished to have the profits during his life, which feoffees had enfeoffeed others to the use of the first feoffor to perform his will and testament; and if the second may sell the land or not, this was the matter. And KINGSMILL thought the second feoffees might sell well enough. See more Trinity 15 Hen. 7, 11 [pl. 22, below].

SAME CASE AS ABOVE, in Exchequer Chamber, Trinity term, 15 Henry VII, 11, pl. 22, A. D. 1500.

"This case is always referred to on this subject." Sugden, Powers, 49 note.

A man enfeoffs A & B on confidence, and afterwards he makes his will and recites that A & B were seized to his use, and that his will is that the said A & B should make an estate to his wife for term of her life, the remainder to his son and heir, and to the heirs of his body begotten, and if the son die without heir of his body begotten, then he wills that the aforesaid feoffees alien the said land, and that the money arising thereby should be distributed for his soul; and afterwards the feoffor dies, and the feoffees make a feoffment over to the same use, and declare their will that the second feoffees shall act according to the first will, and the wife dies, and the son of the first feoffor dies without heir, and the second feoffees alien the land over to a stranger in fee; and if this alienation is good or not, that is the matter, on demurrer in judgment.

REDE, justice: It seems to me that the second feoffees cannot make alienation according to the will of the first feoffor; for the will of a man ought to be taken according to the intent of him who made the will and according to the law of the land. For if one makes his will that the land of which he is seized shall be sold and alienated by J. S. after his death, and afterwards dies seized, here his will shall not be performed, because his will is contrary to the law of the land, to make will of land of which he is seized and dies seized (which was conceded by TREMAILE). And so if a man has feoffees on confidence in his land, and makes his will that one J. S. shall alien his land, and there is no such person in being, here his will is void, because no other man can sell it; and for that reason the feoffees shall be seized to the use of the heir, &c., because it appears by the will that no other man can make alienation. And so it is if a man has feoffees in his land, and makes his will that J. N. alien the same land, here if J. N. die without heir his executors cannot alien, because that is not warranted by the will; but the feoffees shall remain seized to the use of the heir of the first feoffor. So it is here, when he names the feoffees from the first in the will, and then

he says that the aforesaid feoffees shall alien the land for his soul, where the authority is given to them only, their executors may not alien it; but if these feoffees make feoffment over to the same use, yet the first feoffees may alien the land according to the will of the first feoffor (which was conceded by FINEUX and TREMAILE). And also the second feoffees may alien the land by commandment of the first feoffees, and this is good; for it is a sale and the alienation of the first feoffees in law. And none may deny that the second feoffees may alien the land during the life of the first feoffees, though it be not by their commandment so that it be in fact their own alienation; and by consequence no more can they sell after the death of the first feoffees.

TREMAILE to the same purpose: And there is a diversity where the will is that that the alienation shall be made to a person certain, and where it is that the alienation shall be made generally; for if the will was that the aforesaid feoffees alien to one J. S., there if they make feoffment over to the same use, yet the second feoffees shall alien this, for it is in a manner a use to J. S. (which was conceded by REDE and FINEUX.) But when the will is that the aforesaid feoffees alien, there this authority is given to them only; for if the will was that his executors shall alien his land, although they refuse to alien, yet the feoffees cannot alien. So if his will was that the feoffees shall alien, and they will not but die, yet the executors may not alien; and so it is here.

FINEUX, chief justice, to the same intent: And, sir, if one makes no will the common law makes a will for everyone of his lands and goods, and that is, viz., that the heir shall have the land, and the ordinary his goods; but if one will that his land shall be sold in another form than the common law ordains, then the common law suffers him to make his will of them. And every will which one makes ought to be construed and taken according to the purports of the words, or as it may be implied and intended by the words what his intent was; but it should not be construed otherwise than the words imply where they signify. Therefore, here when he recited the names of the feoffees, and then says that the aforesaid feoffees shall alien, there it is as much as to say in effect that no other than they shall alien, and if the will was that the aforesaid feoffees shall alien within the two years next ensuing, if they do not so they may not do it afterwards, but the heir of the feoffor shall have it for all time. And if one makes his will that J. S. shall have the land forever during his life, here by this he shall have it for his life only, for these words *during his life* abridge the interest given before; and so here, when he says the aforesaid feoffees shall alien, there no other can have this power but them only. And there is a diversity where the power given to the feoffees is annexed to the land and where not; for if the will be that the aforesaid feoffees shall make an estate over to a certain person for certain years, there if they make feoffment over to the same use the first

feoffees may not do that, for this power is a thing annexed to the land which none may exercise except him who has the land; but here the will was, that the aforesaid feoffees shall alien the land, and this may well be done after the feoffment made by them to the same use; and therefore their power is not determined by this feoffment. And if one has feoffees in confidence in his land and makes will that the feoffees shall alien his land to pay his debts, there the creditors may compel the feoffees to alien (which was conceded by REDE and TREMAILE).

And so if the will was that a stranger should alien this land to one J. S., there J. S. shall compel this stranger by subpœna to alien this land to him, and the feoffees cannot alien. But if the will is that the feoffees shall alien his land for money to distribute, &c., there none may compel them to make alienation; for no one is damaged though it is not sold; and so a diversity (which was conceded). And if one has feoffees in confidence and makes a will that his executors shall alien his land, there if the executors renounce the administration of the goods, yet they may alien the land, for the will of land is not a thing testamentary, nor need the executors to meddle in this will except as they have the special power given to them. And if one has feoffees in his land and makes will that his executors shall sell his land and then he makes no executors, there the ordinary shall not meddle with the land, nor the administrator neither; for the ordinary had not to meddle but of things testamentary, as of goods; and by consequence, no more can he administer who is only his deputy. And therefore it was lately adjudged in the exchequer chamber by all the judges of England, that if one make a will of his lands that his executors shall sell the land, and alien, &c., if the executors renounce the administration, and to be executors, there neither the administrators nor the ordinary can sell or alien it; which note (which was conceded by REDE and TREMAILE for good law). And if one makes his will that his executors shall alien his land without naming their proper names, if they refuse the administration and to be executors, yet they may alien the land (which was conceded by FINEUX and TREMAILE for clear law. REDE spoke not). And if one makes will that his land which his feoffees have shall be sold and aliened, and does not say by whom, there his executors shall alien it and not the feoffees (by REDE, TREMAILE, and FROWICK). FINEUX said nothing to this this day, but the day before he in a manner affirmed this. CONISBY said that the feoffees shall alien this; for they had the confidence placed in them. But this was denied; for the executors have much greater confidence placed in them than had the feoffees; for the money to arise by the sale of the executors shall be assets in their hands; wherefore that the executors shall sell. FINEUX, REDE, and TREMAILE said that if one make will that his feoffees shall alien his land, all the time before the alienation the heir may take the profits, and they are seized to his use, and if an alienation be not made by them the heir shall have the land for all time.

KELLET v. BISHOP OF LONDON, in King's Bench, Mich. term, 25 Hen. VIII, A. D. 1534—8 Dyer 283a, pl. 30, same case 1 And. 28, pl. 66, Bendloes 12, pl. 10, Bendloes in Kellwey 207, pl. 2, cited 1 Leonard 265.

A question was moved by *Gerrarde,* attorney-general: If *cestuy que use* before the statute of 27 Hen. 8 [c. 10] of three acres of land in divers vills lying apart within one county, by several feoffments, make a feoffment of all the three acres by deed and letter of attorney, and the attorney make livery in one acre in the name of all the three acres, whether that be good for the other acre? And he said many were of opinion that it was not, because the statute of [1] Rich. 3 [c. 1] gave authority to *cestuy que use* to enter and make a feoffment, which he ought to do in his proper person, and not by attorney for him. But the case above was ruled upon demurrer in law to the evidence in trespass, M. 25 H. 8, Rot. 71, in B. R. cor. FITZJAMES [C. J.], &c., that the feoffment was good for all three, upon great debate; and it was between the Bishop of London and others and Kellet. But *quære* if the feoffor had been seized in his demesne as of fee of the acre where livery was made, whether the other two acres should pass or not?

ANON., in Common Pleas? Hilary, 2 Eliz., A. D. 1560—Dyer 177a, pl. 32.

Cestui que use (before the statute) in fee willed by his testament, that A, B, and C, his feoffees, should suffer his wife to take the profits of his land during her life, and after her decease that the premises should be sold by his said feoffees, and the money therefrom received that the feoffees should pay certain persons and to certain intents prescribed. The testator died, A died, and the wife died. Whether B and C, the survivors, may sell? And it seems not, and so it was ruled; but *quære* if they had not been named A, B, and C, but feoffees only. See 15 Hen. 7, 12 [b, pl. 22].

In Lee v. Vincent (Hil. 26 Eliz., A. D. 1584, in Common Bench), Cro. Eliz. 26, Moore 147, 3 Leon. 106, a man devised to his son in tail, and if he died without issue, that the four sons-in-law should sell and distribute the money to his daughters. The son died without issue, one of the sons-in-law died, and afterwards the devisor died; and it was adjudged that the sons-in-law who survived might well sell; for it appeared that his intention was to advance his daughters; and a difference was taken where they are named by their proper names, and where not.

STILE v. THOMSON, in Court of Wards? Hilary, 4 Eliz., A. D. 1562—Dyer 210a.

A man seised of lands in fee-simple made his executors A and B; and by his last will in writing after 32 Hen. 8, willed that his executors should have and hold the issues and profits of two parts of his lands until his heir by the common law should come to the age of 21 years, to the intent that his said executors with the profits of it should pay his debts, perform his legacies, and for the education of his children. One of the executors died; the survivor made his executors and died also, the heir being yet within age. *Quære,* whether the executor of

the survivor may meddle with the profits of the lands and with the disposition thereof during the non-age or not? And CATLYN, chief justice; SAUNDERS, chief baron; A. BROWNE [B.]; and myself [DYER, chief justice of the common pleas], thought that he well may; for this was an interest in the executors by the devise, and not an authority or trust only. *Simile, ante* [Dyer], 177a [pl. 32].

DANNE v. ANNAS, in Common Pleas? Mich. term, 4 & 5 Eliz., A. D. 1563—Dyer 219a.

A man devised his lands to his wife for the term of her life, remainder to K, his daughter, in tail; and if she died without issue, that then, after the death of his wife, the land should be sold for the best price by his executors together with the assent of A. B.; and made his wife and a stranger his executors, and died. The wife entered and died, and A. B. died; and the executor who survived sold the land alone. The question was whether it is a good sale or not. And by the opinion of the court it is not good, for want of sufficient authority.

ALBANY'S CASE, (GRENDON v. ALBANY), in the King's Bench, 28 Eliz., A. D. 1597—1 Coke, 110b—113a.

In trespass brought by John Grendon, plaintiff, against Thomas Albany, defendant, for a trespass committed in twenty acres of land in W. in the county of Middlesex. The defendant as to five acres pleaded that Francis Bunny, 1 May, 20 Eliz., by deed indented did enfeoff Miles Hitchcock to the use of the said Francis for life, and after to the use of one David Bunny in tail, and after to the use of one Walter Bunny in tail, and after to the use of Stephen Bunny in fee. And afterwards, viz., 1 May, 21 Eliz., the said Francis of the said five acres, in which, &c., did enfeoff one Richard Tompson in fee, upon whom the said David entered for the forfeiture. And afterwards, viz., 1 May, 22 Eliz., demised the said five acres to Adam Blunt for 21 years, who infeoffed the said Thomas Albany, the now defendant, and justified the trespass, and gave color to the plaintiff. And as to the said 15 acre residue, the defendant pleaded, that the said David so seised as aforesaid in tail, 2 May, 22 Eliz., by deed indented and inrolled in chancery, according to the statute, did bargain and sell the said 15 acres to the said defendant in fee, and justified the trespass, and gave color to the plaintiff. The plaintiff replied and said, that in the said deed of feoffment of the said Francis Bunny, it was provided, that if it should happen that one Peter Penruddock should die without issue male of his body, that it should be lawful for the said Francis at all times at his pleasure, during his life, by his deed indented to be sealed and delivered in the presence of four honest and credible witnesses at the least, to alter, change, determine, diminish, or amplify any use or uses, limitations, intents, or purposes limited or appointed in or by the said deed of feoffment, or the use of any parcel of the premises. And afterwards, 1 May, 23 Eliz., the

said Peter Penruddock died without issue male, and after, that is to say, 20 March, 24 Eliz., the said Francis by indenture between him and the said David Bunny, and sealed and delivered in the presence of four honest and credible witnesses (naming their names as he ought) did alter the uses in the said deed contained; and further covenanted and agreed with the said David that forever after the said Miles Hitchcock and his heirs, &c., should stand seized of the said 20 acres to the use of the plaintiff in fee, as by the said indenture more fully appears, by force whereof he was seised until the defendant did the trespass, *prout,* &c. The defendant rejoined and confessed, that in the said deed of feoffment there was such a proviso as the plaintiff in his replication hath alleged; but he said that the said Francis Bunny in the lifetime of the said Peter Penruddock, *sc.* 1 April, 23 Eliz., by his deed did renounce, relinquish, and surrender to the said Miles, David, Nicholas, Walter, and Stephen, all such liberty, power, and authority of revocation, &c., which he had after the death of the said Peter without issue as aforesaid. And further the said Francis by the said deed did remise, release, and quit-claim to them the said condition, proviso, covenant, and agreement aforesaid, and all his power, liberty, and authority aforesaid. And further the said Francis by the same deed granted to them and their heirs, that for ever after, as well the said condition, proviso, covenant, and agreement, as the said power, liberty, and authority, should cease, and be to all intents void, &c. Upon which rejoinder the plaintiff did demur in law.

And *Altham* and others of counsel with the plaintiff did argue, that a fine or feoffment could not extinguish such liberty or power; *a fortiori* a release could not extinguish it; for a fine or feoffment hath power and force to exclude the party from all rights and titles to the land, as well present as future; but an authority or power, which is collateral to the right and title of the land, cannot be given or extinguished by fine or feoffment, neither can he thereby disable himself to make an estate according to his authority and power, when it comes *in esse.* As in 15 H. 7, fol. 11 b, where *cestui que use* devised, that the feoffees should sell his land, and died, and afterwards his feoffees made a feoffment over, yet the feoffees might sell against their own feoffment, because the power to sell was mere collateral to the right of the land. And so if executors have power to sell land to J. S. and they enter and disseise the heir, and infeoff a stranger, yet they may sell to J. S. for the reason before. And it was resembled to the case of tithes in 42 Edw. 3, 13a, where it is held, that a prior parson imparsonee shall have tithes against his own feoffment, because he doth not claim them in respect of the ownership of the land, or any right or title therein, but as tithes in respect that he is parson by collateral means. And 12 Assize, plac. 41, pending a *praecipe,* the tenant makes a feoffment, and afterwards an erroneous judgment is given against him, yet he shall have a writ of error against his own feoffment, for the error is collateral to the right of the land; *a fortiori,* in case of a release,

for that which should be released is but a possibility, which cannot be released. And a diversity was taken between a condition precedent and a condition subsequent; for a condition subsequent before the breach thereof may be released, for there the estate passeth, and the condition is annexed to that which may be released. But in the case of a condition precedent, there it is but a possibility; as if I grant to you, that if you do such an act you shall have an annuity of 20*l. per ann.* during your life, and before the performance of the condition you release the annuity to me, the release is void, because the release cannot extinguish a possibility. The case of Littleton, Chapter (b) Release 105 [§], where the son releaseth in the life of his father, the release is void. And 40 Edw. 3, 22, a future duty as a relief, &c., is not released by this word *demand,* 18 Edw. 3, fol. 26a; and [Fitz. Abr.], Avowry 99.

And on the other side it was argued by one of the inner temple; and as to the first point, he said, that a fine or feoffment may utterly extinguish the said power and authority, so that the feoffor had disabled himself to execute it when it came *in esse.* And therefore the case by way of admittance is no other in effect, but that A enfeoffs B to the use of A himself for life, and after to the use of B in tail, and after to the use of C in fee, with proviso and liberty to revoke the uses, and to limit new uses, if A survive B; and afterwards A makes a feoffment, and after B dies; whether A may limit new uses against his own feoffment is the question; and he conceived he could not. And first he said that a livery is of such force that it gives and excludes the feoffor not only from all present rights, but from all future rights and titles. Also as the books are, in the case of tenant by the curtesy in 9 Hen. 7, 1b, and in the case of intruder, and recovery in a writ of deceit in 9 Hen. 7, 24b, and in the case where the son disseised the father and made a feoffment, in 39 Hen. 6, 43a. And in all actions which are in a manner collateral to the land, as 34 Hen. 6, 44a, the case of attaint, 38 Edw. 3, 16b, the case of deceit, in those cases those actions are extinguished by the feoffment of the land, and yet they are collateral to the right of the land, by which no land is demanded, but are only to reform the erroneous proceeding, the false oath, and false return of the sheriff, &c., but because by a mean the possession and inheritance of the land would be also removed and devested by them, for that reason by a feoffof the land, those actions are gone. So in the case at bar, although this power to revoke the former uses and estates, and to limit a new use is not properly any interest or right in the land, yet it is a means by which the possession and right of the land shall be altered and devested out of a third person. Also it is clear, that a future use shall be given inclusively in the livery, as 27 Hen. 8, 29b; and in *Delamer's Case* Plow. Com. [346], and then if a future right, a future action, which is collateral to the right of the land, and a future use, shall be given and extinguished in the livery of the land; so it was said, shall it be in the case at the bar. For let us examine the case by parcels, and suppose that in the case above, the proviso had been only, that if A

survive B that then he might revoke the former uses, without more, it was clear that after the said feoffment he could not revoke, for then he would have the land again against his own feoffment, which would be against all reason and against all the books aforesaid. Then in the case at bar the proviso goes further, *scil.*, that he may alter, change, &c.; suppose then that he had power to revoke the ancient uses, and power to limit new uses to a stranger, how should the stranger have this new use? Certainly by force of the first feoffment made by the said A for out of that all the present and future uses also arise. And so the stranger shall have this use in a manner by the said A against his own later feoffment and livery, which for the reasons aforesaid cannot be. And it was said that the book in 15 Hen. 7, 11b [*ante*]; which hath been cited on the other side, is not to be compared to this case, for two reasons: One, because there the feoffees having power to sell, as is aforesaid, made a feoffment over to the first uses, for so is the book, and then notwithstanding their feoffment they might sell as much as the testator could devise, and that was the use. The second reason, is because when the feoffees sell the use, the vendee is in by the devise of *cestuy que use,* as in the case of executors who have power to sell, their vendee shall be in by the testator and not by them; but in the case at bar, the new *cestuy que use,* as hath been said before, would be in in a manner by the feoffor; for the feoffor in case of an estate-tail limited in use shall be supposed donor. And as to the case in 12 Assize 41, of error, he said, that the feoffment cannot bar him of the writ of error, because notwithstanding his feoffment he remains tenant as to the demandant, and shall plead all pleas which the tenant might plead, notwithstanding that shall be received, &c., and judgment given against him as tenant; wherefore upon such judgment given against him after his feoffment he shall have a writ of error; but if after the judgment given he makes a feoffment, he shall never have a writ of error, nor an attaint; and therefore the reason is not in the case of 12 Assize, as hath been urged, that the feoffment doth not extinguish it, because it is collateral to the right of the land, for then by the same reason his feoffment after judgment given should not extinguish it. Wherefore it seemed to him, that a fine or feoffment may extinguish the said future power.

And of such opinion, upon conference had with the Lord ANDERSON and other justices, was WRAY, Chief Justice of England, and all the court of king's bench; that is to say, that the said power (as well to revoke as to limit new uses) may be utterly gone and extinguished either by a fine or a feoffment.

And as to the second point, he conceived that the said future power might be released, for it may be resembled to a condition subsequent, although the performance or breach thereof cannot be done without an act precedent; as if A enfeoff B and his heirs upon condition that if B survive C if then A or his heirs pay to B his heirs or assigns 40*s.*,

that then he and his heirs shall re-enter; in that case, it is a condition subsequent, and although it cannot be performed but upon a contingency, yet is the inheritance in him, and shall descend to his heir, and therefore may be released, and his heir by his release may be barred. And therefore if a man makes a feoffment in fee with warranty, in that case before he can vouch, he ought to be impleaded, so that the voucher depends upon an act uncertain, that is to say, that he shall be impleaded in a real action by a stranger. Yet by a release of all demands, *Littleton* [§748] in his chapter of warranty, fol. 171, saith, that the warranty is extinguished, for it is an inheritance in law, and may descend to the heir, and by consequence may be released. Also if a man covenant to do a collateral act, in that case before the breach of it, a release of all actions, suits, and quarrels, is nothing worth; for before the breach of it there is not any duty, nor cause of action, but the breach ought to precede as it was adjudged, Trinity, 4 Eliz., Rot. 1027, in common bench. But in the same case a release of all covenants will bar it, as it is said in 35 Hen. 8, Dyer 56, 57. For by his death the law transfers it to his executor, and by consequence he may release it. And 16 Edw. 3, Fitz. [Abr.] Barre 245, a woman hath title of dower of land, whereof one is tenant for life, the reversion to another in fee, and the woman releases to him in the reversion, it is a good bar in a writ of dower against tenant for life; and yet at the same time she had no present cause of action against him, but *in futuro* after the death of tenant for life. So 21 Hen. 7, 41a, a release of an annuity to the patron in time of vacation is good, yet no action lies against him, nor against any other till a successor be made; and yet a release will extinguish it. And suppose in the case at bar, that the power of revocation upon the said contingency had been reserved to the feoffor and his heirs, without doubt it was an inheritance in him, and should descend to his heirs, and by consequence his release shall extinguish it; but as to that point, the court gave no resolution.

But it was agreed *per totam Curiam,* that if the power of revocation had been present, as the usual provisoes of revocation are, that it might be extinguished by a release, made by him who had such power, to any who had an estate of freehold in the land in possession, reversion, or remainder, and thereby the estates which were before defeasible by the proviso, are by such release made absolute.

And he moved another point, that if it was admitted, that the said future power could not be released, yet as well the power as the proviso and covenant might by the said words of defeasance be defeated; for both are executory, *scil.,* the power itself which was created by the said covenant and proviso, which, &c.; and as the proviso and covenant itself commenced by deed, so by deed they may be annulled and defeated. And it was said, that in all cases, when anything executory is created by a deed, that the same thing by consent of all persons who were parties to the creation of it, might by their deed be defeated and annulled.

And therefore it was said, that warranties, recognisances, rents, charges, annuities, covenants, leases for years, uses at the common law, and such like, may by a defeasance made with the mutual consent of all those who were parties to the creation of them, be by deed annulled, discharged, and defeated; for it was said, it would be strange and unreasonable, that a thing which is created by the act of the parties, should not by their act with their mutual consent be dissolved again.

And of such OPINION, also, was WRAY, chief justice, and the whole court, *scil.:* That by the said defeasance as well the said covenant which created the said power, as the power itself created thereby, was utterly defeated and annulled; and according to their resolution judgment for the causes aforesaid was given, *quod querens nil capiat per billam.*

SIR EDWARD CLERE'S CASE, in King's Bench, Mich., 41 & 42 Eliz., A. D. 1600—6 Coke 17a, Moor 476, 567, Cro. Eliz. 877. From Coke.

Assise by Parker against Clere of lands in the county of Norfork. Clement Harwood, seized of three acres of land, each of equal value, held *in capite,* made a feoffment in fee of two of them to the use of his wife for her life, for her jointure, and afterwards made a feoffment by deed of the third acre, to the use of such person and persons, and of such estate and estates as he should limit and appoint by his last will in writing; and afterwards, by his last will in writing, he devised the said third acre to one in fee, under whom the plaintiff claimed. And whether this devise was good for all the said acre or not, or for two parts of it, or void for the whole, was the question.

[OPINION.] And in those cases four points were resolved by POPHAM, Chief Justice, and Baron CLARK, justices of assize of the said county, upon conference had with the other justices:

1. If a man seised of lands in fee makes a feoffment in fee to the use of such person and persons, and of such estate and estates as he shall appoint by his will, that by operation of law the use doth vest in the feoffor, and he is seised of a qualified fee, that is to say, till declaration and limitation be made according to his power. See Lit. fo. 109a. When a man makes a feoffment to the use of his will he has the use in the meantime.

2. If in such case the feoffor by his will limits estates according to his power reserved to him on the feoffment, there the estates shall take effect by force of the feoffment and the use directed by the will; so that in such case the will is but declaratory. But if in such case the feoffor by his will in writing devises the land itself, as owner of the land, without any reference to his authority, there it shall pass by the will; for the testator had an estate devisable in him, and power also to limit an use; and he had election to pursue which of them he would. And when he devised the land itself, without any reference to his authority or power, he declared his intent to devise an estate as owner of the land, by his will, and not to limit an use according to his authority. And in

such case, the land being held *in capite,* the devise is good for two parts and void for the third part; for as the owner of the land he cannot dispose of more. And in such case the devise cannot take effect by the will for two parts, and by the feoffment for the third part; for he made his devise as owner and not according to his authority, and his devise shall be of as much validity as the will of every other owner having any land held *in capite.*

3. If a man makes a feoffment in fee of lands held *in capite,* to the use of his last will, although he devises the land with reference to the feoffment, yet the will is void for the third part; for a feoffment to the use of his will and to the use of him and his heirs is all one.

4. In the case at bar, when Clement Harwood had conveyed two parts to the use of his wife by act executed, he could not as owner devise any part of the residue by his will; so that he had no power to devise any part thereof as owner of the land; and because he had not elected as in the case put before, either to limit it according to his power, or to devise it as owner of the land (for in the case at bar having as owner of the land conveyed two parts to the use of his wife as above), he could not make any devise thereof; therefore the devise ought of necessity to enure as a limitation of an use, or otherwise the devise shall be utterly void. And judgment was given accordingly for the plaintiff for the whole of the land so devised. And afterwards on the said judgment Sir Edward Clere brought a writ of error in the king's bench; but he did not prevail, but the judgment was affirmed.

YELLAND v. FICLIS, in Common Bench, Mich. term, 2 Jac. 1, A. D. 1605—Moore 788.

In *ejectione firmæ* the case was such: One covenanted to stand seized to the use of himself for life, with divers remainders over to others, some for life and others in tail, with the reversion in fee in himself, with general power of revocation of all uses in remainder; and afterwards he made a lease for years to a stranger, and afterwards during the term he revoked. The question was whether he had power to revoke or had suspended his power of revocation by his lease, during the term. COKE, chief justice, that he may revoke for all except the term; and if one make a conveyance with power to make leases and with power of revocation, if he make a lease he may revoke for the residue. But the doubt here is where he had no power to make leases and yet made a lease. At last the court was divided in opinion.

"According to Roll [Abr. K, pl. 3], they agreed that he could not revoke during the lease, and it was doubted whether he could revoke even after the lease. * * * At this day, it is quite clear, that a lease for years granted out of the interest of the donee of the power cannot be defeated by a subsequent exercise of the power, for the power is quoad that suspended. The question then is, what is the operation of the suspension? Does it merely postpone the estates created by the power, or does it, according to the above opinion of Roll, actually suspend the very right of executing the power. It seems clear that it only postpones the vesting in posses-

sion of the estates, and that a power may be exercised though suspended." Sugden on Powers 52.

BEAL v. SHEPHERD, in King's Bench, term, Mich. 5, Jac. 1, A. D. 1608—Cro. Jac. 199.

Replevin. The case was a copyholder in fee surrenders to the use of his will, and by his will deviseth to his wife his copyhold land, "and if she hath issue by the devisor, that the issue shall have it at his age of 21 years; and if the issue die before that age, or before his wife, or if she hath no issue, that then she shall choose two attorneys, and she to make a bill of sale of my lands to her best advantage," &c. It was held *per curiam,* that she hath those lands for life; and she not having issue, hath not any interest to dispose, but hath authority by his will to nominate two who shall sell, and they may make sale; and the vendee shall be in by the first will, and there needs not be any new surrender.

WHITLOCK'S CASE, in the Common Pleas, Hil. 6 Jac. 1, A. D. 1609—8 Coke 69b.

In a replevin between John Chappel, plaintiff, and William Whitlock, defendant, for taking of a gelding in Rings-Ash, in the county of Devon, in a place called Cunny-Park; the defendant avowed the taking in the place where, &c., as in his freehold, for damage feasant. The plaintiff in bar of the avowry pleaded, that one William Whitlock, the elder, was seised of a messuage, 20 acres of land, 12 acres of wood, and 20 acres of heath, in Rings-Ash aforesaid, in fee, whereof the place where, is parcel, and demised the said tenements to one John Bullhead for his life, by force whereof he was seized for life, the reversion expectant to the said William Whitlock the elder, and the said William Whitlock the elder, 11 March, 18 Eliz., by his indenture tripartite, in consideration of a marriage to be solemnized between William Whitlock the younger and Margaret, daughter of John Botler, covenanted and agreed by the said indentures, that the said William Whitlock the elder, before the feast of the Birth of Christ next ensuing, would assure and convey to Leonard Yeo and Anthony Whitlock, and their heirs, the tenements aforesaid, to the uses, intents and purposes expressed and declared in the said indentures, and to no other uses or intents, viz., till the said marriage, to the use of the said William Whitlock the elder, and his heirs; and after the said marriage, to the use of William Whitlock the elder, for his life, without impeachment of waste, and afterwards to the use of the said William Whitlock the younger and the heirs of his body, and afterwards to the use of J. Whitlock and his heirs: *Set per eand' indenturem ulterius provisum, concesum et argreatum fuit, quod liceret et licitum foret præd' Will' Whitlock, fen. ad aliquod temp' extunc facere dimissionem, (Anglice* lease) *sive dimissiones, consessionem sive concessions, tam in possessione quam in reversione de tenementis præd' cum' pertin', unde, et inter alia, sive de aliqua parte inde. Proviso semper quod præd' dimissio sive dimis-*

siones, consessio sive concessiones non excederent super numerum trium vitarum ad majus vel viginti et unius annorum, et ita quod super quamlibet talem demissionem et demissiones, concessionem et concessiones, maxime untiq' et confuet' annual reddit', heriot' et servita sive plus redderentur et reservarentur, solubil' duran' dict' demissione sive demissionibus, concessione, sive concessionibus: and that the said Leonard and Anthony, and their heirs, should stand seized, &c., to the use of every such fermor, &c., and afterwards, 18 May, 18 Eliz., the said William the younger, and Margaret, intermarried; and afterwards, Trinity 18 Eliz., William Whitlock the elder levied a fine of the tenements aforesaid, according to the same indentures, to the uses therein contained, by force whereof, and of the statute of uses, the said William Whitlock the elder was seized of the reversion of the said tenements, &c., for his life, the remainder over, according to the said indentures. And the said William Whitlock the elder so seized, 1 Sept., 31 Eliz., *dimisit cuidam Christian' Hearne tenem' præd' cum pertin' unde, et inter alia habend' et occup' eidem Christianæ et assignat' suis pro term' 99 annor' plenaire complend' et finiend', si præd' Christiana et quid' Petr' Rattenbury, five eorum alter, tam diu vivere contingeret:* the said term to commence after the death or determination of the estate of the said John Bullhead, *reddendo et solvendo proinde annuatim post inceptionem dictæ dimissionis, præfato Will' Whitlock, seu hæred' et assign' suis et tali personæ et personis quib' hæreditament' præmissorum post mortem præd' Will' Whitlock, seu de jure spectaret seu pertineret durante dicto termino* 14 *s. ad quatuor maxime usualia festa annuatim salvendo, &c.* And the plaintiff justified under the said lease, and averred the life of the said Peter Rattenbury, and that the most ancient and accustomed yearly rents, heriots, and services, &c., were reserved, &c., upon which the avowant did demur in law.

And in this case two questions were moved. 1. Whether William Whitlock the elder had pursued his authority or not, in making the said lease for 99 years, determinable on the said two lives? 2. Whether the said reservation of the rent was according to the said *Ita quod, &c.* And *as to the first,* it was objected, that the authority was distinguished, *sc.,* either to make a lease not exceeding the number of three lives, or for 21 years, by which it appears that the intention was either to make a lease for three lives, &c., or if he would make a lease for years, that it ought to be for 21 years; but in the case at bar, the lease is not for three lives, &c., nor for 21 years, but for 99 years, if two or either of them shall so long live, and so his authority not pursued. And if one hath power to make a lease for three lives, he cannot make a lease for 99 years determinable upon three lives, &c., *quod fuit concessum per totam curiam.* But it was answered and resolved by the court, that in the case at bar the lease was good, and the power which the lessor had was well pursued; for the proviso of creation of his power to make leases, is in the beginning absolute, affirmative, and indefinite, *scil.* to make a lease or leases, grant or grants, &c., as well in possession

as in reversion of the tenements, or any parcel thereof, &c., which is without any limitation. Then the proviso of correction is added, *scil.* that such lease or leases, grant or grants, shall not exceed the number of three lives at most, or 21 years, which clause is negative, and qualifies the generality of the first proviso; so the power by the first is general, and by the second the lease ought not to exceed three lives, &c. And when the lease is made for 99 years determinable upon two lives, it doth not exceed the number of three lives, although in truth it is not a lease for lives. 2. The power is to make leases as well in possession as in reversion, with the limitation aforesaid; and in a lease for three lives cannot be made in reversion, but a lease for years determinable upon lives may, and the lessor himself had but a reversion expectant on an estate for life at the time of the creation of the said power: so that the intention of the parties was [not] to make a lease for years absolutely for 21 years, but any term of years determinable upon three lives, &c., which is in equipage with 21 years, he well might. And the difference was taken and agreed between a particular power affirmative, and a general power restrained with a negative: for it is true, that if one hath power to make a lease for three lives, or 21 years, he cannot make a lease for 99, if three shall so long live, &c., but if he has power to make any lease or grant, provided such lease or grant shall not exceed the number of three lives, or 21 years, there he may make a lease for 99 years, if three shall so long live, for that doth not exceed the number of three lives, but in truth is less; for every term for years, which is but a chattel, is less in estimation of law, than an estate for life, which is a freehold.

As to the second point, it was objected, that the said reservation was such, that it was not payable during the said lease, as it ought, but only during the life of the lessor; for he having but an estate for life, reserved the rent to him and his heirs, and his heirs cannot have it, and the latter words, *scil.* to such person and persons who have the inheritance of the premises, &c., are merely void, for no rent can be reserved but to the lessor, donor, or feoffor, and his heirs, who are privies in blood, and not to any who is privy in estate, as to him in reversion, remainder, &c.

But IT WAS RESOLVED, that the reservation in the case at bar is good. For the said lease hath not its essence from the estate of the lessor, which he hath for life, but the lease hath its essence out of the said fine, and in construction of law precedes the estate for life and all the remainders; for after the lease made, it is as much as if the use had been limited originally to the lessee for the said term, and then the other limitations in construction of law follow it: and that is the reason that the usual clause in such indentures is, that the conusees and their heirs shall stand seised to the use of such lessees, &c. So that the lessee, in the case at bar, derives his estate out of the estate which passed by the fine. Then, when the lessor reserves rent to him and his heirs, it is good, for that by construction of law precedes the limitations of

the uses, and then it being well reserved, it is well transferred to every one to whom any use is limited. So if the reservation be to the lessor, and to every person to whom the inheritance or reversion of the premises shall appertain during the term, that is likewise good, for the law will distribute it to every one to whom any limitation of the use shall be made. And in such case no rent is reserved to a stranger, for the reservation precedes the limitation of the uses to strangers. But it was agreed, that the most clear and sure way was to reserve rent yearly during the term, and leave the law to make the distribution, without an express reservation to any person. But it was resolved, that all the said three several ways were good enough and effectual in law.

PITS v. PELHAM, in House of Lords, 22 Car. 2, A. D. 1670—1 Lev. 304, 2 W. Jones 25.

A man devises lands to his wife for her life, and that after her death the reversion shall be sold, and the money arising thereby distributed between his heir and three nephews. The heir refuses to sell or to join with the wife in the sale; and on a bill exhibited in chancery against him, to compel him to join in the sale, the bill was dismissed by the Lord Keeper Bridgman, who held the will to be void as to the sale of the reversion, it not being said who shall sell. But in the House of Peers, they, on advice with the judges, reversed the dismission, and decreed that the heir should sell; for when no person is appointed to sell it ought to be intended that he shall sell who has the estate, which is the heir. See 5 Hen. 7, 12b [15 Hen. 7, pl. 12; *ante*], *by Hide, Fenwick*, and *Fineux;* a devise that lands should be sold and not said by whom, they shall be sold by the executors; and to the same intent when they are to be sold for payment of debts.

"As the law now stands, it seems: 1. That where a power is given to two or more by their proper names, who are not made executors, it will not survive without express words; 2. That where it is given to three or more, generally, as to 'my trustees,' 'my sons,' &c., and not by their proper names, the authority will survive whilst the plural number remains; 3. That where the authority is given 'to executors' and the will does not expressly point to a joint exercise of it, even a single surviving executor may exercise it; but, 4, That where the authority is given to them *nominatim*, although in the character of executors, yet it is at least doubtful whether it will survive; 5. But where the power to executors to sell arises by implication, the power will equally arise to the survivor. I shall close this subject with Sir Edward Coke's advice, to give the authority to the executors or the survivors or survivor of them, or to such or so many of them as take upon them the probate of the will, or the like." Sugden on Powers, c. 3, sec. 2.

DIGGES'S CASE, in Queen's Bench, Hilary term, 42 Eliz., A. D. 1600.—Moore 603, s. c. 1 Coke 173, 2 And. 205.

A case of a *monstrans de droit* in the queen's bench was thus: Christopher Digges exhibited in the chancery his *monstrans de droit* of office found after the death of Tho. Digges, his older brother, which proved he died seized of certain land, and that Posthumous Digges was his son and heir within age in ward of the queen. And Christopher made

title that one Christopher Digges, father to Thomas and of Christopher plaintiff herein, was seized in his demesne as of fee, and by will in writing devised the land to Christopher now plaintiff, and died seized in fee, Christopher entered and was seized when Thomas disseized him and died seized by disseizin,, wherefore, &c. The attorney of the queen replied in maintenance of the office, that the said Christopher the father was seized in fee and covenanted to stand seized to the use of himself and his wife for life, remainder to Thomas and his heirs male of his body; the said Christopher so seized died seized, the wife died, Thomas entered and was seized in tail and died seized having issue Posthumous now in ward to the queen, without this that Christopher the father died seized in his demesne as of fee. On which issue trial was had in the queen's bench and special verdict found, viz., that Christopher the father seized of the land in the *monstrans de droit* mentioned and of other land, covenanted by indenture 10 Eliz., to stand seized to the use of himself and his wife for life, remainder to the said Thomas and the heirs males of his body, remainder to the heirs males of the body of Christopher the father; provided that it should be lawful for him at any time during the life with the covenantees or three of them, by deed indented and enrolled in any court of the queen of record, for advancement of his children, payment of debts or legacies, or any other necessary purposes, to make void and frustrate any of the use or uses, estate or estates only for such part of the premises as by him and the three covenantees should be thought convenient, and by the said writing should be limited, and to limit new use or uses by the said writing, and that the land should be held to the new uses and no other; after which, May 6, 12 Eliz., Christopher the father, with the three covenantees, by deed indented and enrolled in the chancery declared that because Christopher was in debt and ought to be enabled to sell his land to pay his debts, they agreed that the first uses as to the land not in the *monstrans de droit* contained should be void and that these should be to Christopher and his heirs in fee simple; after which Christopher and the three covenantees, by another deed, Sept. 20, 13 Eliz., indented and enrolled in the common bench, Mich. 13 & 14 Eliz., for payment 1000*l.* debt of Christopher, declared that all of the uses in the first indenture contained all the land from the time this deed should be enrolled in chancery should be void, and that they should be to Christopher in fee and to no other use; after which Christopher, Oct. 26, 14 Eliz., covenanted to levy a fine of the land to the use of himself and his wife for part and to his own heirs, and of the residue to the use of their heirs, which fine was levied accordingly; and after this fine levied, the deed dated Sept. 20 was enrolled in the chancery; and later this Christopher devised the land in fee tail to Christopher now plaintiff, and died in possession: and whether on all this matter he died seized in his demesne as of fee, the jurors prayed the advice of the court.

And after many arguments now Trinity term, 42 Eliz., it was adjudged that he did not die seized in his demesne as of fee. As to the reasons of which judgment the justices resolved on seven points: 1.

That the words in the proviso, *that it shall be lawful for him at any time during his life,* &c., should be understood as from time to time during his life, not restrained to one time in his life. 2. That the words *any use or estate of the premises or any part thereof* should well enough mean one part at one time and another part at another time, and not restrained to election to make revocation one act of all or any part and no revocation afterwards of any other part. 3. That if one has power of revocation that extends to different lands, that if he levy a fine, or make a feoffment by which he determines his power of revocation of part of the land, yet the power remains for the residue. And this was the *Case of the Earl of Salop* in the court of wards, and between *Bullock and Standen* in the star chamber. But of the release of a power of revocation in part it was doubted. 4. If one has a power of revocation not *in esse* but in the future time to come or accrue, that he by a fine levied or feoffment made of the land extinguishes this; as the case between *Albany and Grendon* in the queen's bench, where Sir Richard Knightley made a feoffment to the use of himself for life, remainder in tail to Valentine his oldest son, remainder in tail to Edward his second son, with power in himself to revoke if Valentine should die without issue male; and adjudged that by a feoffment that he made in the life of Valentine he had extinguished the future power of revocation. 5. That he who has power to revoke estates and no estate himself in the land may not by fine or feoffment or release extinguish this power, because it is a mere authority and no interest; as if a devise should be that one should sell certain land, and the party authorized levies a fine or makes a feoffment or releases all his right, yet he may afterwards sell the land. And on the other hand, if one executes an authority in any land given by another he does not extinguish his own interest in this; as if a lessee for years makes livery as attorney of the lessor. 6. If one has power to revoke by deed or tender or other ceremony and he executes the ceremony, there the uses and the estates should cease without entry or claim if the party who had the power was tenant of the freehold; but if he had nothing in the land it was doubted if it was not necessary to claim, because then it is in the nature of a condition, in the other case is a limitation. 7. That the words being *that it shall be lawful for him by writing,* &c., *to make void and frustrate* should be understood and construed that as soon as he had executed the writing the uses and estates should be void by the law. Wherefore, in the principal case they resolved that as to the land when the first revocation was made by writing enrolled in chancery, dated May 6, 16 Eliz., the revocation was good and the estates theretofore created were void without entry or claim by Christopher Digges the father; but these lands were not contained in the *monstrans de droit.* Also that this revocation of part was no impediment for him afterwards to proceed to revocation of the residue. But as the words of the deed of Sept. 20, 13 Eliz., appointed the uses to be void as soon as the deed should be enrolled in chancery and not before, then the fine of the land levied by Christopher the father before enrollment of the said last deed of Sept. 20 in the chancery had extin-

guished the power of revocation; wherefore Christopher the father at the time of his death held the land for life under the first indenture of 10 Eliz., and not in his demesne as of fee.

SAVILE v. BLACKET, in High Court of Chancery, Hilary term, 1721.—1 P. Wms. 777.

A settlement of lands was made to the use of A for 99 years if he should so long live, remainder to trustees during the life of A, &c., remainder over, with a power to A to charge the lands with divers sums of money. A, the trustees, and the remainder man in tail join in suffering a recovery, and declaring new uses thereof, viz., to the use of A for life with remainder over.

LORD CHANCELLOR [MACCLESFIELD]: This joining of A in making the new settlement without reserving a power to charge the premises with the said money, has destroyed that power which A had of charging; for the contrary construction would enable him to defeat his own grant. There are two sorts of powers, one annexed to the estate, as a power to make leases, &c., which is destroyed by parting with the estate, another which may be termed collateral to the estate, as this power of charging it with money, and this last A would have had though he should have survived the term of 99 years; for still he might have charged the premises therewith. So might he have done though he had assigned over the term. But having joined in the new settlement, he must not now derogate from his own act, or undo what he has done before. * * *

TOLLET v. TOLLET, in Chancery Mich. term, 1728.—2 P. Wms. 489, 1 White & T. Leading Cases in Eq. *227.

The husband, by virtue of a settlement made upon him by an ancestor, was tenant for life, with remainder to his first, &c., son in tail male, with power to the husband to make a jointure on his wife *by deed* under his hand and seal. The husband having a wife, for whom he made no provision, and being in the Isle-of-Man, by his *last will* under his hand and seal, devised part of his lands within his power to his wife for her life.

Objection: This conveyance being by a will is not warranted by the power, which directs that it should be by deed, and a will is a voluntary conveyance, and therefore not to be aided in a court of equity.

MASTER OF THE ROLLS [Sir Joseph Jekyll]: This is a provision for a wife who had none before, and within the same reason as a provision for a child not before provided for; and as a court of equity would, had this been the case of a copyhold devised, have supplied the want of a surrender, so where there is a defective execution of the power, be it either for payment of debts or provision for a wife or children unprovided for, I shall equally supply any defect of this nature. The difference is betwixt a *non-execution* and a *defective execution* of a power: the latter will always be aided in equity under the circumstances

mentioned, it being the duty of every man to pay his debts, and a husband or father to provide for his wife or child; but this court will not help the non-execution of a power, since it is against the nature of a power, which is left to the free will and election of the party whether to execute or not, for which reason equity will not say he shall execute it, or do that for him which he does not think fit to do for himself.

And in this case, the legal estate being in trustees, they were decreed to convey an estate to the widow for life in the lands devised to her by her husband's will.

While courts of equity will aid a defective execution of a power in favor of widow, children, creditors, and purchasers for value; they will not give their aid to mere volunteers unsupported by any meritorious consideration, such as brothers, sisters, cousins, or illegitimate children of the donee. Tudor v. Anson, 2 Ves. Sr. 582; Breit v. Yeaton, 101 Ill. 242.

ANDREWS v. EMMOT, in Chancery, 1788.—2 Brown C. C. 297.

Bill in chancery by Elizabeth, widow of John Andrews, to have transfer of 3000*l.* 3% annuities, which upon their marriage were settled upon trustees to pay the interest to him for life, with trusts over, and with power in him to appoint the residue, and if he should fail to appoint and complainant should survive him, to such persons as she should by deed or will appoint, and in default of such appointment to her executors or administrators. She contended that he made no appointment. He left a will by which, after several legacies, he gave all the rest and residue of his moneys and securities for money, goods, chattels, and personal estate, whatsoever and wheresoever, after the death of his wife, to the defendant. The master of the rolls found that the testator left personal estate insufficient by 664*l.* to pay his legacies, and without reporting the amount he had at the time of making his will, decreed for the complainant. The defendant appealed.

LORD CHANCELLOR [THURLOW]: I think this case does not amount to a probable argument. With respect to the evidence, when the case came back his Honor thought the reference immaterial; and I think it is so. The testator, under the settlement, was competent to make a will, as to so much of his property as should remain after the death of his wife. The question is whether, in making that will, he has executed the power against his wife, whose property the fund was. It is necessary, in order to do this, that he should, by his will, notify his intention to do it. It is too late now to expect that a testator, in order to execute a power, shall make an express reference to it; because it has been determined that, if a man disposes of that over which he has a power, in such a manner that it is impossible to impute to him any other intention but that of executing the power, the act done shall be an execution of the power. But the doctrine is not carried by any case further than this, and it would be cruel to do it; as it would be throwing the property of testator into utter confusion. Then you must not go out of the instrument itself, to gather the consruction of it. I do not mean

by saying this to exclude the rule that where there is what has been called a latent ambiguity in the will you shall not go out of the will to explain the testator's intention by circumstances; but to inquire into the testator's situation in order from thence to gather what is probable he meant, is a great deal beyond that. Here the testator has made a will by which it does not appear he recollected the settlement made upon the marriage, at least there is only one circumstance, the postponement of the residue till after the death of his wife, by which he appears to remember it; for I do not rely on the argument of those who insist that from the attestation of the will by two witnesses, he intended to execute the power. Decree affirmed.

BAINTON v. WARD, in Chancery, 1741.—2 Atkin 172.

By marriage settlement of George Ward he had power "by appointing two trustees under any deed in his lifetime, or by will at his death, to charge all the wife's estate with a sum not exceeding £2000." By his will he devised £500 apiece to his two sisters. He died in debt to the plaintiffs, and the question was whether they should have satisfaction out of the £2000 as part of his personal estate, against this appointment.

LORD CHANCELLOR [HARDWICKE]: I am of opinion that this ought to be considered as the personal estate of George Ward. Where there is a general power given or reserved to a person for such uses, intents, and purposes as he shall appoint, this makes it his absolute estate, and gives him such a dominion over it as will subject it to his debts. For it would be a strange thing if volunteers, as the legatees are, should run away with the whole, and that creditors for a valuable consideration should sit down by the loss without any relief in this court. The case of *Shirley* v. *Ferrars* is directly in point. This money was not settled at all, but absolutely in the power of George Ward, and consequently there can be no doubt but his creditors must have the benefit of it. Supposing a man has a power to dispose by appointment of a reversion in fee, and makes no disposition of it, yet it shall be assets to satisfy specialty creditors.

HOLMES v. COGHILL, in Chancery, 1802.—7 Ves. 499-508, 28 Eng. Rul. Cas. 577.

Bill by simple contract creditors of John Coghill (deceased) against his widow and eldest son, praying an account and payment of their debts out of his personal estate, and out of any real estate liable for his specialty debts for so much as simple contract creditors may stand in the place of specialty creditors. Defendant's answers showed that his personal estate were insufficient to satisfy specialty creditors; wherefore the general question was whether complainants could avail themselves of the fund with which deceased had power by a marriage settlement of 1754 and under a will and under indentures of settlement executed

by him and others in 1787, by which he had power to charge and encumber the premises by deed or will with any sum not exceeding 2000*l.* for such uses as he should think proper. He died in 1790, leaving a will made in 1775, by which he gave 2000*l.* to be raised under his power to be applied towards payment of his debts, and made his wife and others executors.

THE MASTER OF THE ROLLS [SIR WM. GRANT]: The question in this cause is whether the sum of 2000*l.* which Sir John Coghill had power to raise should be considered assets for his debts. The creditors contend, first, that he has executed the power. If he has, there is an end of the question. If he has not, secondly, they insist that this sum is substantially his property, as he had an absolute power to appoint it.

As to the first point, it is clear the only power in existence at his death was created by the deed of 1787. The power reserved by the marriage settlement was discharged for valuable consideration. That power he had executed by his will. But the power itself being gone before his death, the will had nothing to operate upon, unless it can be applied to the new power created for appointing the same sum, to be raised out of different estates. It is admitted he has not directly executed the new power; but it is said that subsequent to the creation of it he executed a codicil that has the effect of republishing the will, and making it speak as at the time of the republication. Be it so. It speaks only of the power given by the marriage settlement, which was as much gone as if it never had existed. There is no way in which the will can be made to speak of the new power for a new consideration affecting different estates. I am clearly of opinion there is no execution of this power.

Upon the second point, there is an evident difference between a power and an absolute right in property; not so much with regard to the party possessing the power, as to the party to be affected by the execution of it. If our attention is to be confined to the former entirely, there is no reason why the money he has a right to raise should not be considered his property as much as a debt he has a right to recover. But the latter can only be charged in the manner and to the extent specified at the creation of the power. The compact is not to raise 2000*l.* absolutely and in all events, but that it may be raised in a certain manner, viz., according to his appointment by deed or will, to be duly executed and attested by two or more witnesses. To say that without a deed or will this sum shall be raised, is to subject the owner of the estate to a charge in a case in which he has never consented to bear it. The chance that it may never be executed, or that it may not be executed in the manner prescribed, is an advantage he secured to himself by the agreement, and which no one has a right to take from him. In this respect there is no difference between a non-execution and a defective execution of a power. By the compact the estate ought not to be charged in either case. It is difficult therefore to discover a sound principle for the authority this court assumes for aiding a defective execution in certain

cases. If the intention of the party possessing the power is to be regarded, and not the interest of the party to be affected by the execution, that intention ought to be executed, wherever it is manifested; for the owner of the estate has nothing to do with the purpose. To him it is indifferent, whether it is to be executed for a creditor or a volunteer. But if the intent of the party to be affected by the execution is to be regarded, why in any case exercise the power except in the form and manner prescribed. He is an absolute stranger to the equity between the possessor of the power and the party in whose favor it is intended to be executed. As against the debtor, it is right that he should pay; but what equity is there for the creditor to have the money raised out of the estate of a third person in a case in which it was never agreed that it should be raised? The owner is not heard to say it will be a grievous burden and of no merit or utility. He is told, the case provided for exists, it is formally right, he has nothing to do with the purpose. But upon a defect which this court is called upon to supply he is not permitted to resort to this argument; and to say it is not formally right, the case provided for does not exist, and he has nothing to do with the purpose. In the sort of equity upon this subject there is some want of equality. But the rule is perfectly settled, and though perhaps with some violation of principle, with no practical inconvenience. But further than supplying a defect in the execution the court has never gone. In *Lassells* v. *Lord Cornwallis,* 2 Vern. 465, the lord keeper says that "the court has not gone so far as, where a man has a power to raise money, if he neglect to execute that power, to do it for him; although he thought it might be reasonable enough and agreeable to equity in favor of creditors."

At the opening I was strongly impressed with an idea that there was no authority for the proposition contended for by the creditors. None was adduced except some generality of expression in Atkins's statement of the judgment in *Bainton* v. *Ward* [above]. There is no such general proposition necessary to the decision of that case, for the whole sum was appointed; in which particular the statement is more correct as introduced (2 Ves. 2) in the report of *Lord Townshend* v. *Windham:* and there *Lord Hardwicke* lays it down expressly that without an appointment no person could be entitled to the money, though the power was as large as in this instance. It was argued that because the court will for creditors lay hold of the money when it is appointed for a volunteer, the court ought to lay hold of it for them though there is no appointment; for in the former case the application is against his intention. But in the given case the money is already raised by a due execution of the power; and the court only directs the application. It does not follow that by its own act it shall charge the estate when the power is not executed nor attempted to be executed. Many of the cases cited determine only that a limited gift to a man with power to dispose of the thing given will carry the ownership. But there is no doubt this is a power in the proper sense of the word; and the power

not having been executed, I am of opinion the money cannot be raised.

This decision was affirmed upon appeal by Lord Chancellor Erskine, reported in 12 Ves. 206.

"There is such flagrant injustice in applying the bounty of a testator to the benefit of those for whom it was not intended, that the mind revolts from it. An appointee derives the title immediately from the donor of the power, by the instrument in which it was created; and consequently not under but paramount to the appointor by whom it was executed; by reason of which it is impossible to conceive that the appointor's creditors have an equity. A man who is employed to manage the conduit pipe of another's munificence is authorized by a general power of disposal to turn the stream of it to any person or point within the compass of his discretion; and his creditors have no right in justice or reason to control him performing his function, because it was not assigned to him as their trustee. It is the bounty of the testator, and not the property of his steward, that is to be dispensed." Per Gibson, C. J., in Commonwealth v. Duffield, 12 Pa. St. 277.

In Wales v. Bowdish (1889), 61 Vt. 23, 17 Atl. 1000, a bill in equity by creditors whose claims existed when the power was given, was dismissed when filed after the donee of the use for life with power as to the residue had exercised the power by devise to his wife and died. The creditors have no claim at law in such a case. Brandies v. Cochrane (1884), 112 U. S. 352, 5 S. Ct. 194.

When the donee of the power has exercised it in favor of volunteers, courts of equity have frequently held the appointee as a trustee for creditors of the donee of the power or that the fund is assets liable to his creditors. Patterson v. Lawrence, 83 Ga. 703, 10 S. E. 355, if no sufficient other assets; Clapp v. Ingraham, 126 Mass. 200; Johnson v. Cushing, 15 N. Ham. 298, 41 Am. Dec. 694; Smith v. Garey, 2 Dev. & B. (N. Car.) 42; Freeman v. Butters, 94 Va. 406, 26 S. E. 845.

Statute of New York, Mich., &c. "Every special and beneficial power is liable in equity to the claims of creditors, in the same manner as other interests that cannot be reached by execution at law, and the execution of the power may be decreed for the benefit of the creditors entitled." **N. Y.** R. S. (1828), pt. 2, c. 1, t. 2, Art. 3, § 93; **Mich.** R. S. (1846), c. 64, C. L. (1897), § 8887; **Minn.** St. (1858), c. 34, § 32, St. (1905), § 3297; **Wis.** R. S. (1849), c. 58, § 32, St. (1898), § 2131.

GROSVENOR v. BOWEN, in R. I. Sup. Ct., July 2, 1887.—15 R. I. 549, 10 Atl. 589.

DURFEE, C. J. This is a suit by the complainants, claiming to be owners of a lot of land in East Providence, to enforce the specific performance of a contract with them by the defendant for the purchase of said lot. The suit is amicable, the defendant being willing to perform his contract if the complainants can make a good title in fee-simple. The bill, which is demurred to, sets forth the title as follows, to-wit: The estate formerly belonged in fee-simple to Rosa Ann Grosvenor, who died intestate, leaving five children, who inherited it subject to the curtesy of her surviving husband. One of said children died intestate, without issue, so that his share descended to the others. Another of said children, to-wit, Alice G. Mason, wife of John G. Mason, died later, leaving a will by which she devised all of her real estate which she inherited from her mother to said John for life, and upon his decease to such person or persons, and upon such limitations and conditions as

he might by his last will and testament name, limit, and appoint, and, in default of such appointment, to her own heirs at law. The heirs at law of Mrs. Mason are William Grosvenor, Jr., Rosa Ann Grosvenor, and James B. M. Grosvenor, who, together with William Grosvenor, surviving husband of Rosa Ann Grosvenor, deceased, and said John G. Mason, devisee for life under the will of said Alice, are the parties complainant in this suit. The entire estate is in them, if those of them who are the heirs at law of Mrs. Mason took vested remainders under her will; no question being made but that the interest inherited by Mrs. Mason from her deceased brother descended upon her death to her surviving brothers and sisters; and therefore they can make a clear title to the defendant if John G. Mason, devisee for life and donee of the power of appointment under the will, can release the power, or can extinguish it by joining with the other owners in a conveyance of the lot in fee-simple.

Upon the question whether estates limited in default of appointment are to be considered as vested or contingent during the continuance of the power, there has been some diversity of decision. In *Lovies' Case,* 10 Coke 78, decided in A. D. 1614, and in *Walpole* v. *Conway,* Barnard. 153, decided in A. D. 1740, such remainders were held to be contingent; but later, in *Cunningham* v. *Moody,* 1 Ves. Sr. 174 (A. D. 1748), they were held to be vested, subject to be divested by the execution of the power; and in *Willis* v. *Martin,* 4 Term. R. 39, the latter view was affirmed after great consideration upon elaborate arguments; and Chancellor Kent says: "The doctrine is now definitely settled, and it applies equally to personal estate." 4 Kent, Comm. 324; also *Osbrey* v. *Bury.* 1 Ball & B. 53. We think the estate in remainder vested in the heirs at law of Alice G. Mason, subject to be divested by the execution of the power given to John G. Mason.

We think it was competent for John G. Mason to release the power to the tenants in remainder, or to extinguish it by joining with the other complainants in remainder, in a deed conveying the bargained lot to the defendant in fee-simple, and therein releasing the power to him. "Powers relating to land," says Mr. Cruise, "whether appendant or in gross, may be destroyed by a release to any person having an estate of a freehold in possession, remainder, or reversion in the lands to which the power relates; for where powers are given to a person having an estate or interest, either present or future, in the land, the exercise of them is considered as a species of property advantageous to him; and there is no reason why he should not be allowed to part with or exclude himself from the benefit of it." 4 Greenl. Cruise, c. 19, § 4, citing *Digges' Case,* 1 Coke 174a. See, also, *Albany's Case,* 1 Coke 110b. The power held by Mason is a power in gross. Mr. Sugden says: "A present power, not simply collateral, may be extinguished by release to any one who has an estate of freehold in the land in possession, reversion, or remainder, and thereby the estates which were before defeasible or chargeable by the power are by such release made absolute." Sugd. Powers, 87; citing *Albany's Case,* 1 Coke 110b, and 1 Inst. 265b. Of course,

if the life-tenant, having the power, can release it to the tenant in remainder, he can also release it to the latter's grantee; and if he can do this there is no reason why he cannot join with the tenant or tenants in remainder in a deed conveying the entire estate, and therein release the power to the grantee. *De Wolf* v. *Gardiner,* 9 R. I. 145.

In *West* v. *Berney,* 1 Russ. & M. 431, decided in 1819, the vice-chancellor, Sir John LEACH, reviews the precedents; and on the strength of *Albany's Case* and *Leigh* v. *Winter,* W. Jones, 411, decides that such a power can be released by the donee who is tenant for life, where he himself is the grantor or settlor of the estate; and expresses his opinion that it may equally be released if he is grantee simply "because his release must be to him who takes subject to the power, and the exercise of the power would be inconsistent with the release, which is a species of conveyance affecting the land." He also held that such a power is not a trust, even when it is to appoint particular persons, as children; it being optional with the donee to exercise it or not. And see *King* v. *Melling,* 1 Vent. 225; *Smith* v. *Death,* 5 Madd. 371.

In *Horner* v. *Swann,* 1 Turn. & R. 430, an estate was devised to A. for life, and, after her death, to such of the testator's children living at his death as A. should appoint, and, in default of appointment, to the children equally, with survivorship in case of any dying under 21. A. and the three surviving children, all over 21, contracted to sell the devised estate, and upon a bill for specific performance the question was whether the power could be released or extinguished; and Sir *Thomas Plummer,* M. R., decreed specific performance. See, also, *Osbrey* v. Bury, 1 Ball & B. 53; 4 Kent, Com. 347.

We think the complainants are entitled to specific performance.

BROWN v. PHILLIPS, in R. I. Sup. Ct., Aug. 17, 1889.—16 R. I. 612, 18 Atl. 249.

STINESS, J. John Kelton devised his entire estate to his wife Sally Kelton for life, with power to sell so much and such parts of the same from time to time as she might think necessary for her comfortable support. After his death Sally Kelton made a deed of the estate to Herbert B. Wood in trust that he should manage the same, and from the income or proceeds of sale thereof pay the cost and expenses of her care and support; no other reference than by this provision being made to the power under which she might sell. In *Phillips* v. *Wood,* 16 R. I. 274, 15 Atl. 88, this court held that the power was personal, and not assignable; that she only had authority to sell what was necessary for her comfortable support, and that she could not transfer the estate, with that discretionary power, to another. Consequently the trustee took only what the grantor had the right to convey, outside of the power, which was her life-estate. Wood then held the legal title to her life-estate, and she had the equitable, beneficial interest therein. After this decision, Mrs. Kelton made another deed to Wood of all her right, title, and interest in and to the estate of her husband; no reference

whatever being made to her power to sell under the will for her support. In *Phillips* v. *Brown,* 16 R. I. 279, 15 Atl. 90, this court held that this second deed, in the absence of any reference to the power and of anything to show an intention to act under it, operated only to convey the interest she then had in the estate, which was her equitable estate for life. Mrs. Kelton died in August, 1887. The complainant, to whom Wood conveyed a part of the estate, now seeks to have the second deed of Mrs. Kelton to Wood reformed, upon the ground that Mrs. Kelton intended by that deed to convey the estate in execution of the power, and that by mistake the deed was so drawn that it failed to express her true intent. The defendant Phillips, residuary legatee under the will of John Kelton, demurs to the bill. The question, then, is whether the case stated entitles the complainant to relief. It may well be questioned whether, if the deed should be reformed so as to express an intention to convey the property under the power, it would show a compliance with the power. The bill does not set forth a sale of the property to provide for Mrs. Kelton's support, but a simple conveyance "for one dollar and other good and valuable consideration." We may assume that the "other consideration" included an agreement on the part of Wood to provide for Mrs. Kelton's support. But if so, turning over property on such an agreement is a very different thing from selling so much thereof as may be necessary for her support. However, as this point has not been taken, nor argued, we pass it by and consider the case as presented.

It is well settled, as the complainant claims, that a court of equity will aid the defective execution of a power; but, as stated in the leading case of *Tollet* v. *Tollet,* 2 P. Wms. 489, 1 White & T. Lead. Cas. *227, *228 [*ante* —], there is a difference between a non-execution and a defective execution of a power. The "court will not help the non-execution of a power, since it is against the nature of a power, which is left to the free will and election of a party whether to execute or not; for which reason equity will not say he shall execute it, or do that for him which he does not think fit to do himself." In order to sustain the execution of a power the instrument must, at least, show an intention or attempt to execute it. This may appear when the instrument would otherwise be inoperative, or when the reference to the subject of the power is such as to manifest the intention; but the non-execution of a power cannot be aided by proof of an intention to execute. *Wilkinson* v. *Getty,* 13 Iowa 157; *Garth* v. *Townsend,* L. R. 7 Eq. 220; *Foos* v. *Scarf,* 55 Md. 301; *Mitchell* v. *Denson,* 29 Ala. 327. Mrs. Kelton's deed makes no reference to the power, nor to the subject of the power, by description of the estate which she could sell under it, as distinct from her life-estate. Nor was the deed inoperative without the aid of the power. Nothing appears in it to show an intent to convey anything beyond her own interest. It is like the will in *Andrews* v. *Emmet,* 2 Brown, Ch. 297 [*ante* —], which Lord ALVANLEY, in *Hales v. Margerum,* 3 Ves. 299, 301, called a leading case upon this point. There, after saying the

power need not be recited in express terms, but that the intent must appear by some kind of reference to the power, the court added: "But the testator has not described anything; all his expressions will refer to his own property." The recent case of *Patterson* v. *Wilson,* 64 Md. 193, 1 Atl. 68, gives a careful review of this subject. It was held, as the will in question contained no reference to the power nor to the subject on which the power was to operate, and as it was not denied that the testator had other property, her will would be operative without the aid of the power, and could not be regarded as an execution of the power. See, also, *Bingham's Appeal,* 64 Pa. St. 345; *Lippincott* v. *Stokes,* 6 N. J. Eq. 122. Our conclusion is that, as Mrs. Kelton did not expressly undertake to act under the power, nor manifest an intention or attempt so to do, but made a deed which, by its terms, was operative only upon her own interest in the property, the bill presents a case of non-execution simply, which the court cannot aid. The demurrer to the bill must be sustained.

VERNOR v. COVILLE, in Mich. Sup. Ct., June 25, 1884.—54 Mich. 281, 20 N. W. 75.

Action on the common counts in assumpsit by Benjamin Vernor as trustee and indorsee to recover on a note for $598.25 given by A. M. Coville & Co., as part of the purchase price under a contract between John Webster to buy and John G. Rumney, as executor of the will of Martha Rumney, to sell testatrix's homestead, by virtue of the following clause in her will: "I hereby nominate and appoint my son John G. Rumney and my friend Guy F. Hinchman the executors of this my last will and testament, with full power and authority to sell and convey any real estate of which I shall die seized." Hinchman refused to qualify, and Rumney had continually acted as sole executor. Defendants pleaded the general issue and gave notice to several intended defenses. The trial below resulted in judgment for defendants and plaintiff appealed.

SHERWOOD, J. * * * It is claimed by counsel for the defendants that the power was not conferred upon John Rumney alone, under the will, to make the sale of the homestead property in the contract heretofore given, contemplated, and that his letters of administration give him no additional power for that purpose; that the power attempted to be used could only be exercised by both persons named in the will as executors; and that no sale of real estate could be made by Rumney alone, except as authorized by the judge of probate; and that the contract which was the consideration of Webster's indorsement, and which gave the plaintiff his right to the custody of the note, was therefore void, and the plaintiff could not recover. This point raised the only question we deem it necessary to consider, and, adopting the counsel's premises, the condition to which he arrives necessarily follows. The question raised is one of much importance to the people of our state. When the case was before this court before, this question was not finally

determined, the proper party plaintiff not then being before the court. The solution of the question depends upon the proper construction of the will, and the statutes relating to the subject. The language of the will under which the executor claims to derive his authority is plain and explicit, and it must be construed the same as though the provisions of the statute relating thereto and applicable were written in the instrument, as they necessarily constitute a part thereof, and it must be regarded as having been made with reference thereto.

The power of the executor to make sale of the real estate, and the contract of the sale thereof, which we are now considering, is given by the will, if at all, and is not derived from any authority conferred by the judge of probate. It is very clear, from the terms of the will, that Mrs. Rumney had great confidence in the persons named as her executors, as they were charged with important discretionary duties, and the exercise of much discrimination and judgment in the disposition, management, and control of the property designed for the children, of the most difficult and delicate character. And, in such a case, nothing but imperative duty can ever excuse a court in disturbing or interfering with the action taken by the executors. No question is or can be made about the power of both persons named as executors to do the act in question, had both consented to serve, and qualified. Hinchman renounced the trust, and refused to qualify. His relation to the will and the trust was thereby rendered the same as though he had died. Could the remaining executor execute the powers and trust created under the will, when there was no express provision authorizing one of the executors so to do, in case of the death of the other, or his failure to qualify? There is no question but that one, under such circumstances, may exercise the powers and discharge the duties conferred upon both, in the management and disposition of the personal estate, and bind all persons interested therein. Dyer, 23; Vern. Abr. 271; Bac. Abr. D, 1; 2 Williams, Ex'rs, 810; *Jacomb* v. *Harwood,* 2 Ves. 267; *Wheeler* v. *Wheeler,* 9 Cow. 34; *Bogert* v. *Hertell,* 4 Hill, 492, 503; *Weir* v. *Mosher,* 19 Wis. 311; *Herald* v. *Harper,* 8 Blackf. 170; *Dominick* v. *Michael,* 4 Sandf. 374; *Boughton* v. *Flint,* 13 Hun, 206. Co-executors and co-administrators are regarded, in law, as but one person, and acts done by one are deemed the acts of all in all matters relating to the personal estate. One may execute a valid release of a debt. *Murray* v. *Blatchford.* 1 Wend. 583. He may discharge a mortgage (*People* v. *Keyser,* 28 N. Y. 226); may make an assignment of a mortgage (*Cronin* v. *Hazeltine,* 3 Allen, 324); and this court has held that a deed made by one or two or more administrators was not void, and not subject to attack in collateral proceedings. *Osman* v. *Traphagen,* 23 Mich. 80.

It is claimed by plaintiff's counsel that the following provision of our statute (see How. St. § 5844), if the power did not exist at common law, gives full authority to the one executor in this case to make valid sale of the real estate of the deceased, and authorized him to make the contract in question. The statute reads as follows: "When all the

executors appointed in any will shall not be authorized, according to the provisions of this chapter, to act as such, such as are authorized shall have the same authority to perform every act and discharge every trust required and allowed by the will; and their acts shall be as valid and effectual for every purpose as if all were authorized and should act together; and administrators with the will annexed shall have the same authority to perform every act and discharge every trust as the executor named in the will would have had, and their acts shall be as valid and effectual for every purpose."

I think this provision clearly authorizes the executor in this case to sell the real estate of the deceased mentioned in the will, and to make the contract for the sale thereof, to secure the performance of which the deposit of the note in question and its indorsement was made. Not only is the sale authorized, but the designation of the person and his power to make it are derived solely from the will. The probate of the will and letters testamentary furnish no more than the evidence of the existence of these things, and not the authority for doing them.

I think it may well be doubted whether the provisions of our statute, or that of 21 Hen. VIII, c. 4, so far as it relates to executors, is anything more than confirmatory of the common law upon this subject. *Bonifant* v. *Greenfield*, 1 Cro. 80; Co. Litt. 113a. Whether this be so or not, it is quite certain that the spirit of the law requires that the intention of the testator, as expressed in his will, should be carried out. This could be as well accomplished, usually, by one person as by more; and whatever number may be selected, they are all supposed to be chosen with special reference to their qualifications for the position, and to be prepared to act in accordance with the views and desires of the testator concerning the execution of the trust; and however large the number may be, each is vested with all the powers of the others, and all are required to perform the same duty or duties, and in the discharge of them they act as an individual. But life and ability to act are always uncertain. That the testator may always have some person of his own choosing to execute his will, in case of the death or inability of the others to act, is undoubtedly the principal object of appointing two or more executors, and to hold that the inability of one thus appointed to act, or his neglect to qualify, disqualifies the others, it seems to me would manifestly be against the intention of the testator, and the true spirit of his will, and defeat the very object he had in view in making the appointment. To remove all doubt upon the subject, and secure the construction here contended for, seems to have been the object of the statute upon the subject both in England and this country.

It would in my judgment be a perversion of the true intention and meaning of the statute, and do violence to what I believe to have been for a long time the accepted interpretation of the law by the profession generally in our state, to hold otherwise. It is possible, and, I think, quite probable, that were we to give the statute the construction claimed for it by counsel for the defendant, titles to large amounts of real estate,

purchased in entire good faith, and now quietly enjoyed, might become unsettled, and all the evil consequences usually accompanying such actions by the courts would follow.

It seems to me there is no sufficient reason for, nor does public policy require, such a construction of the law, and it ought not to be given by this court. The following authorities may be examined with profit in examining the question raised in this case: *Bonifaut* v. *Greenfield,* 1 Cro. 80; *Dike* v. *Ricks,* 4 Cro. C. 335; 1 Sugd. Pow. (6th Lond Ed.) 143, 144; *Pitt* v. *Pelham,* Ch. Cas. 178; *Wardwell* v. *McDowell,* 31 Ill. 364; *Clinefelter* v. *Ayres,* 16 Ill. 329; S. C. 20 Ill. 463; *Conklin* v. *Edgerton,* 21 Wend. 430; *Roseboom* v. *Mosher,* 2 Denio, 61; *Wills* v. *Cowper,* 2 Ham. 124; Powell, Devises, 196, 197; *Judson* v. *Gibson,* 5 Wend. 224.

I think the executor in this case had the power to make sale of the homestead property of the Rumney estate, and the contract made therefor, and that the indorsement and transfer of the note in question were not without consideration, and must be held valid.

It is unnecessary to consider the case further. This disposition of the main question raised, renders it necessary to reverse the judgment, and a new trial must be granted.

CAMPBELL and CHAMPLIN, JJ., concurred.

COOLEY, C. J. The question in this case arises under the statute, which provides that "when all the executors appointed in any will shall not be authorized, according to the provisions of this chapter, to act as such, such as are authorized shall have the same authority to perform every act and perform every trust required and allowed by the will, and their acts shall be as valid and effectual for every purpose as if all were authorized and should act together; and administrators with the will annexed shall have the same authority to perform every act and discharge every trust as the executors named in the will would have had, and their acts shall be as valid and effectual for every purpose." How. St. § 5844. Another statute provides that "when a power is vested in several persons, all must unite in its execution; but if, previous to such execution, one or more of such persons shall die, the power may be executed by the survivor or survivors." Id. § 5628.

In this case two executors were named in the will, one of whom declined to qualify, but is still living. The other qualified and acted. The question discussed in the case was whether it was competent for him alone to execute, not for purposes of administration, and long after the time for the settlement of the estate had expired, a power which, by the will, was conferred upon both. It is an interesting and important question, and was ably argued, but it is not discussed in the opinion of Mr. Justice SHERWOOD, which treats the case as if the power had been executed as a step in administration. No one has ever doubted, so far as I know, that for administrative purposes the acting executor might execute such a power, and no authority beyond the statute itself is needed in support of such an execution. Whether a case like the present is within the intent of the statute first recited is quite a different

question, which I do not discuss, because the prevailing opinion in the case avoids any mention of it.

CARTER v. SLOCOMB, in N. Car. Sup. Ct., April 5, 1898.—122 N. Car. 475, 65 Am. St. Rep. 714, 29 S. E. 720.

Action to set aside a sale made under a power in a mortgage. Judgment for the plaintiff. Defendant appeals.

FAIRCLOTH, C. J. The sole question presented is whether a sale of land by a mortgagee, under a power of sale in a mortgage, made after the death of the mortgagor, without notice to the heir, conveys a good title; that is, whether at the death of the mortgagor the power of sale ceases and becomes inefficacious. In his state, when a mortgage is executed, the mortgagee becomes the legal, and the mortgagor the equitable, owner; and until the day of redemption is past the mortgagor has a legal right, and afterwards an equity of redemption. *Hemphill* v. *Ross,* 66 N. C. 477. No question of fraud enters into the controversy, nor any as to the amount of the mortgage debt. The mortgagor cannot demand any notice of intention to sell under the power, and the heir at law stands in the place of his ancestor. *Carver* v. *Brady,* 104 N. C. 219, 10 S. E. 565; *Fraser* v. *Bean,* 96 N. C. 327, 2 S. E. 159. The general rule is that a power ceases with the life of the person giving it; but where the power is coupled with an interest, it survives the life of the person giving it, and may be executed after his death. By a "power coupled with an interest" is meant an interest in the thing itself; that is to say, the power must be ingrafted on the estate in the thing, and not on the product of the exercise of the power. *Hunt* v. *Rousmanier's Heirs,* 8 Wheaton 203. This principle is not affected by any change of circumstances such as the death of the mortgagor. 8 Am. & Eng. Enc. Law, 875; *Cranston* v. *Crane,* 93 Am. Dec. 106. "The death of the mortgagor does not revoke a power of sale." 2 Jones Mortgages, § 1792, and cases cited. "In those states where the common law rule prevails, that such a power is coupled with an interest, the death or bankruptcy of the mortgagor does not revoke or suspend the power of the legal holder to sell under the power, as the power is coupled with an irrevocable interest, and cannot be revoked; but in those states where this power is not coupled with an interest, the rule is different." 2 Pingree Mortgages, § 1336. The principle here announced is fully recognized in *Parker* v. *Beasley,* 116 N. C. 1, 21 S. E. 955, and other cases by this court. Upon these authorities we find that there was error in the judgment below. Error. Reversed.

This case is cited in an extended review of the decisions to the same effect on this point in Frank v. Colonial & U. S. Mortgage Co. (1905), 86 Miss. 103, 70 L. R. A. 135, 38 So. 340. "In a deed to secure a debt which passes title, the power is coupled with an interest and is not revoked by the death of the maker. In a mere mortgage it is otherwise." Baggett v. Edwards (1906), 126 Ga. 463, 55 S. E. 250.

LANE v. LANE, in Del. Sup. Ct., June 16, 1903.—4 Penn. 368, 55 Atl. 184, 64 L. R. A. 849, 103 Am. St. Rep. 122.

Bill in chancery by Fannie Lane as administratrix of Jesse Lane against Martin Lane as trustee and others, for an accounting. The question was whether by his will devising and bequeathing "all my estate, real and personal, of whatever kind and wheresoever situate," to said Martin Lane as trustee, Augustin Lane had executed the following power given him by the will of said Jesse Lane: "And upon his decease, then in trust to dispose of said principal sum of $50,000 in such manner as my said son Augustin by his last will and testament, or by any writing executed as such, shall direct and appoint;" the fund being given by the will of Jesse to a trustee to pay the income to Augustin in person during his life. From decree for plaintiff, defendants appeal.

SPRUANCE, J. * * * The question for our determination is whether, by the will of Augustin S. Lane, there was a valid execution of the power of appointment given to him by the said eighth item of the will of his father, Jesse Lane, the elder. If there was not, then under the will of Jesse Lane, the elder, upon the death of Augustin S. Lane, his son and only surviving issue, Jesse Lane, Jr., became entitled absolutely to the trust fund, and his administratrix, the complainant below, is entitled to recover the same, with the accrued interest and income thereof. The rules of the common law applicable to this case have been quite well established by numerous decisions in England and in this country.

In *Parker* v. *Kett*, 12 Mod. 469, decided in 1701, it was said by the court: "When one has an authority, and does an act which can be good no other way but by virtue and in pursuance of that authority, it shall rather be understood to have been by force of his authority, than void, though in doing the act he takes no notice of his authority; but where one has an interest and an authority together, and he does an act generally, it shall be construed in relation to his interest, and not to his authority."

Andrews v. *Emmot*, 2 Bro. Ch. 297, is a leading case upon this subject. By a marriage settlement certain bank annuities were conveyed to trustees in trust for certain purposes, and in trust, after the decease of John Andrews and his wife, if there should be no child, to transfer the trust fund to such persons as the said John Andrews should by deed or will appoint. John Andrews by his will, after giving sundry legacies, bequeathed, after the death of his wife, "all the rest and residue of his monies, and securities for money, goods, chattels, and personal estates, whatsoever and wheresoever, and of what nature, kind, or quality soever, to John Emmot." The Master of Rolls, after quoting the above citation from *Parker* v. *Kett*, said: "If one applies this doctrine to the present case, the testator has not referred to the power, but has done the act generally; and he had property of which he could dispose. * * * The testator has not described anything. All his expressions will refer to his own property." Held, that the will of John Andrews

was not an execution of the power. Upon appeal the decree below was affirmed; the Lord Chancellor, holding that the power was not executed by the will of John Andrews, saying: "It is necessary, in order to do this, that he should, by his will, notify his intention to do it [execute the power]. It is too late now to expect that a testator, in order to execute a power, should make an express reference to it, because it has been determined that, if a man disposes of that over which he has a power in such manner that it is impossible to impute to him any other intention but that of executing the power, the act shall be an execution of the power."

In *Roach* v. *Haynes* (1803), 8 Ves. Jr. 584, Lord Chancellor *Eldon* held that a power of appointment was not executed by a general bequest of property described as "my estate and effects"; that such a bequest could pass only that in which the testator had an interest, and not that as to which she had merely an authority to appoint.

In *Bradley* v. *Westcott* (1807), 13 Ves. Jr. 445, *Sir William Grant*, Master of Rolls, decided that a power of appointment was not executed by a request of "all my personal estate, money, securities for money, goods, chattels, and effects, whatsoever and wheresoever, and of what nature, kind, or quality soever, and all my estate and interest therein," and that said bequest was applicable only to the testator's own personal property.

To the same effect are *Lovell* v. *Knight* (1829), 3 Sim. 275, and *Lempriere* v. *Valfy*, 5 Sim. 108.

In *Denn* v. *Roake* (1830), 6 Bing. 475, *Alexander, C. B.*, in delivering to the House of Lords the unanimous opinion of the judges that the will of one Sarah Trymer did not operate as an execution of her power to dispose of certain real estate by her will, said: "There are many cases upon this subject, and there is hardly any subject upon which the principles appear to have been stated with more uniformity or acted upon with more consistency. They begin with *Sir Edward Clere's Case* in the reign of Queen Elizabeth, to be found in the Sixth Report, and are continued down to the present time; and I venture to say that in no instance has a power or authority been considered as executed, unless by some reference to the power or authority, or to the property which was the subject of it, or unless the provision made by the person intrusted with the power would have been ineffectual—would have had nothing to operate upon, except it were considered as an execution of such power or authority. In this case there is no reference to the power, there is no reference to the subject of the power, and there is sufficient estate to answer the devise without calling in the aid of the undivided moiety now in question. * * * It is said that the present is a question of intention, and so, perhaps, it is. But there are many cases of intention, where the rules by which the intention is to be ascertained are fixed and settled. It would be extremely dangerous to depart from these rules in favor of loose speculation respecting intention in a particular case. It is, therefore, that the wisest judges have thought

proper to adhere to the rules I have mentioned, in opposition to what they evidently thought the probable intention in the particular case before them."

Sir Edward Sugden, in his admirable work on Powers (vol. 1, p. 385), uses this language: "It is firmly settled that a mere general devise or bequest, however unlimited in terms, will not comprehend the subject of the power, unless it refer to the subject, or to the power itself, or generally to any power vested in the testator."

The rules of the common law in respect to the execution of powers were changed by St. 1 Vict., c. 26, § 27, passed in 1837, which provided that a general devise of the real estate of the testator should be construed to include all real estate over which such testator may have had a power of appointment, and should operate as the execution of such power, unless a contrary intention should appear by the will, and that a bequest of personal estate in like general words should operate as the execution of such power under similar circumstances.

The leading American case is *Blagge* v. *Miles* (1841), 1 Story, 426, Fed Cas. No. 1,479, in which Judge *Story* says: "It is now admitted to be established, as the general rule, that the intention of the testator is the pole star to direct the court in the interpretation of wills. * * * Similar doctrines now generally prevail in regard to the execution of powers, and especially in regard to their execution by last will and testament. * * * The intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful, under all the circumstances, then that doubt will prevent it from being decreed an execution of the power. * * * Three classes of cases have been held to be sufficient demonstrations of an intended execution of the power: (1) Where there has been some reference in the will, or other instrument, to the power; (2) or a reference to the property, which is the subject on which it is to be executed; (3) or where the provision in the will or other instrument, executed by the donee of the power, would otherwise be ineffctual, or a mere nullity—in other words, it would have no operation, except as an execution of the power."

The rule thus stated was referred to with approval by the Supreme Court of the United States in *Blake* v. *Hawkins,* 98 U. S. 315, 396, 25 L. Ed. 139, and *Lee* v. *Simpson,* 134 U. S. 572, 590, 10 Sup. Ct. 631, 33 L. Ed. 1038. In many of the states the common law rules as to the execution of powers have been altered by statute similar to that of St. 1 Vict.; but, where not so altered, with very few exceptions, said rules appear to be in force in this country.

In Maryland a statute of this character was adopted in 1888; but prior to that time it was uniformly held that the intention to execute a power of appointment by will must appear by a reference in the will to the power, or to the subject of it, or from the fact that the will would be inoperative without the aid of the power. *Mory* v. *Michael* (1861), 18 Md. 227; *Foos* v. *Scarf* (1880), 55 Md. 301; *Cooper* v. *Haines* (1889), 70 Md. 282, 17 Atl. 79.

The common law rule was applied in New Jersey in the case of *Meeker* v. *Breintnall* (1884), 38 N. J. Eq. 345, and in Connecticut in the case of *Hollister* v. *Shaw* (1878), 46 Conn. 248.

In Massachusetts, in *Amory* v. *Meredith,* 7 Allen, 397, decided in 1863, the common law rule was rejected, and the rule of St. 1 Vict. adopted, as more likely to accomplish the intention of persons having powers of appointment. The court say: "We are aware of no decisions in this commonwealth, binding on us as an authority, which should compel us to adopt a rule of construction likely in a majority of cases to defeat the intention it is designed to ascertain and effectuate. Seeking for the intention of the testator, the rule of the English statute (1 Vict., c. 26, § 27) appears to use the wiser and safer rule." This case was followed in the later Massachusetts cases, and also in New Hampshire. *Emery* v. *Haven* (1893), 67 N. H. 503, 35 Atl. 940.

In Pennsylvania the courts adhered to the old rule of construction until the adoption of the statute of 1879, which provided that "a bequest of the personal estate of the testator or any bequest of personal property described in a general manner, shall be construed to include any personal estate or any personal estate to which such description shall extend as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

If this statute was applicable to the question before us, the will of Augustin S. Lane would, without doubt, be a valid execution of the power. But the donor of the power, Jesse Lane, being a citizen and resident of this state, and his will a Delaware will, and the trustee a citizen and resident of this state, the question as to execution of the power is to be determined by the law of this state, and not by the law of Pennsylvania, the domicile of Augustin S. Lane.

Questions as to the execution of a power of appointment of personal property are to be decided by the law of the domicile of the donor of the power, and not by the law of the domicile of the donee of the power. This was conceded in the argument of the counsel of the defendants, and is abundantly established by authority in this country and in England. *Cutting* v. *De Sartiges,* 17 R. I. 669, 24 Atl. 530, 16 L. R. A. 367; *Sewall* v. *Wilmer,* 132 Mass. 131; *Bingham's Appeal,* 64 Pa. 345; *Pouey* v. *Hordern,* L. R. [1900], 1 Ch. Div. 492; *Hernando* v. *Sawtell,* L. R., 27 Ch. Div. 284, 294; *In re Megret* [1901], 1 Ch. Div. 547. * * *

Applying the settled common law rules of construction to the will of Augustin S. Lane, we have no difficulty in reaching the conclusion that it was not an execution of his power of appointment. It certainly cannot be said of this will that the intention to execute the power is apparent and clear, and that it is not fairly susceptible of any other interpretation. It is at least doubtful, under all the circumstances, and that doubt is sufficient to prevent it from being decreed an execution of the power. *Blagge* v. *Miles, supra.* There is nothing in the will, or in

the circumstances of the testator, his family, or estate, so far as they are known to us, to indicate that it was his intention to execute the power. He designates the property bequeathed by him as "all my estate, real and personal, of whatever kind and wheresoever situate." While he was entitled to the income of the trust fund during his life, and had the right to dispose of it by his will, it was not, in any proper sense, his estate, or any part of his estate.

The words, "of whatever kind and wheresoever situate," do not in any degree enlarge the meaning or operation of the words "all my estate." In *Andrews* v. *Emmot* and *Bradley* v. *Westcott, supra,* similar, and even stronger, superadded words were held to have no such effect. The words "all my estate," "my estate," and "estate," as they occur in the latter part of the second item and in the third item of the will, obviously refer to what the testator had already bequeathed, viz., his own property, and not to that as to which he had only a power of appointment.

This will does not allude to the will creating the power, or to the power, or to the trust fund, the subject of the power. If the operation of the will be limited to the testator's own estate, it will not be ineffectual, as he had at the time of his decease a personal estate the income of which was abundantly sufficient to pay the annuity of $1,200 for his wife and to support and educate his son during his minority.

We are therefore of the opinion that the decree of the chancellor should be affirmed, and it is so ordered.

CHAPTER VII.

CONDITIONS.

BRACTON, Book II, c. 6, fol. 18—A. D. 1256-60?

Likewise donations may be made with some modification and with a condition added; as if one should say, "I give to such a one so much land, &c., that he may give me so much" (or that he may find me necessaries), such a donation, although it be gratuitous, nevertheless is simple and absolute, and if delivery follows, it cannot be revoked; but he who has delivered it may insist upon this, that he who has accepted it should keep his bargain and do what he has promised. But if to such a donation a condition has been forthwith attached at the commencement of the donation, that unless the acceptor keep his bargain to the deliverer it shall forthwith be allowable for the deliverer to put himself into that land and to hold it to himself and his heirs quietly of the acceptor and his heirs, if afterwards he who has delivered the land should put himself into seizin and the acceptor has attempted to bring against him an assize of novel disseisin, in the first place an inquiry must be made whether he who accepted the tenement has found for the deliverer so sufficiently what are the necessaries which have been promised that he ought thereupon to be content; if not, indeed, the assize fails, but if yea, he shall recover by the assize. But if he has not found sufficiently the necessaries and the deliverer cannot put himself into seizin under the aforesaid condition, he shall have an action upon the condition to regain his seizin; but if he should be in possession he may maintain himself in his possession by the exception of the agreement.
* * *

(Same fo. 19.) This condition is possible or impossible; if it be possible and within one's power, as if I say, "I give you a certain thing if you give me ten things," the donation is valid, but it is suspended until the condition takes effect. As if you claim the thing, I can object that you have not given me the ten things. Likewise, if the condition be impossible, as if I say, "I give you that thing if you can touch the sky with your fingers," the donation is not valid, and the condition is held to defeat it.[1] Likewise, a donation is not valid from the beginning, but is suspended in the power of another, a condition having been added; as if I should say, "I give you such a thing if Titus has willed," (or has thought or has done a certain thing) because unless he has done this thing the donation will not be valid. * * * Likewise, there are other conditions which are express and are made in negative words; as if it be said, "If Titus should not be heir you shall be the heir," or,

"If you shall not have heirs of your body, then the lands so given shall return to such persons," one or more, together or successively. Likewise, there is sometimes a tacit condition and it is in affirmative words; as if it be said, "If A be the heir of B, I substitute you in turn," that is I make you heir, and if one of them predeceases the other the living is to succeed the dead. Likewise, of conditions, some are double; as if it be said, 'If you have not heirs of your body or if you have had [such] and they have failed, then let the given land revert to me and to my heirs." * * *

Likewise, a condition may impede the descent to the right heirs, against the common law; as if I should say, "I grant you so much land for the term of ten years, and after the term let the land revert to me, and if I should die within the term of ten years, I grant on behalf of myself and my heirs, that the land shall remain to you for your life or in fee," and so the condition makes it a free tenement and fee, and the condition takes away from the heirs an assize on the death of their ancestor, because if on first sight they have a direct action, the termor, however, will have an exception founded on the agreement. Likewise, what has been from the commencement a free tenement and for life may be changed by an agreement into a term; as if one should grant to another land for life, a condition may be made between them, that if the tenant die within a certain time, the heirs of the tenant, or his assigns or his executors, may keep the land so given to the end of a certain time after the death of the tenant himself; and thus the condition makes it a free tenement for a term and the contrary and furnishes an exception against the true owner and his heirs. Likewise, in the same way, it furnishes an exception against an assize of novel disseisin, as has been frequently stated above, respecting the supplying of necessaries. * * * Likewise, it furnishes an exception against the true heirs and against an assize on the death of an ancestor if there be anyone who says, when he is about to go abroad, "I grant to A such a land of mine for a certain term (as in the case of persons who have adopted the badge of the cross), and so, that if I shall have returned he shall restore to me my land, but if I shall die on my journey or shall not return, the land shall remain for A in fee;" and if the condition arises that such person has not returned, and his heir claims by an assize on the death of his ancestor, the exception of the condition shall bar him, and so the donation will be mixed; for instance, it will be a feoffment with a term, and they shall have one beginning, although a different ending; and then the term and the feoffment begin at the same time, although they cannot stand together, nor do they march with equal steps, but one of them precedes and stands still, and the other is pendent

[1]The original is: Ut si dicam: Do tibi istam rem si caelum digito tigeris, non valet donatio, et pro non adjecto habetur conditio. Which, strictly rendered, would be: As if I should say: I give you that thing if you can touch the sky with your fingers; the gift is invalid and the condition is regarded as not written.

until the condition takes effect or fails; but if the condition fails, each is terminated, that is, the tenement with a term or with a fee, and the contrary. But if the condition takes effect, it forthwith ceases to be a term, and the fee or tenement, which from the commencement began and remained pending, now remains and holds firm and the term vanishes.

Term on Condition to Enlarge to a Fee.

BRITTON, 1 Liber c. 5, Sec. 15, p. *96.—A. D. 1275—1300.

A fee may be made to arise out of a term; as is the case where one going a pilgrimage leases his land for a term of years with this condition, that if he does not return, the land shall remain in fee to the termor; such a condition shall always be a bar to the action of the heir of the pilgrim. And thus it appears that feoffments and purchases may be conditional as well as simple and without condition.

LITTLETON'S TENURES. Littleton Died in 1482.

§ 350. Also if land be granted to a man for a term of five years, upon condition that if he pay to the grantor within the two first years 40 marks that then he shall have fee, or otherwise but for term of five years, and livery of seisin is made by force of the grant, now he hath a fee simple conditional, &c. And if in this case the grantee doth not pay to the grantor the 40 marks within the first two years, then immediately after the said two years past, the fee and the freehold is and shall be adjudged in the grantor, because that the grantor cannot after the said two years presently enter upon the grantee, for that the grantee hath yet title by three years to have and occupy the land by force of the same grant, and so because the condition is broken by the grantee and the grantor cannot enter, the law will put the fee and the freehold in the grantor. For if the grantee in this case makes waste, then after the breach of the condition, &c., and after the two years, the grantor shall have his writ of waste.

COKE LIT. 216b.—A. D. 1620-30.

Many are of opinion against Littleton in this case, and their reason is, because the fee-simple is to commence upon a condition precedent, and therefore cannot pass until the condition be performed; and that here Littleton of a condition precedent doth, before the performance thereof, make it subsequent; And for proof of their opinion they avouch many successions of authorities that no fee-simple should pass before the condition performed. * * * 217 a * * * Notwithstanding all this there are those that defend the opinion of Littleton, both by reason and authority. By reason, for that by the rule of law a livery of seisin must pass a present freehold to some person, they cannot give a freehold *in futuro,* as it must do in this case, if after livery of seisin made the freehold and inheritance should not pass presently, but expect until the condition be performed; and therefore if a lease for years be made

to begin at Michaelmas the remainder over to another in fee, if the lessor make livery of seisin before Michaelmas, the livery is void, because if it should work at all it must take effect presently and cannot expect. Secondly, they say that when the lessor makes livery to the lessee, that it cannot stand with any reason against his own livery of seisin a freehold should remain in the lessor, seeing there is a person able to take it. But if a man by deed make a lease for years, the remainder to the right heirs of I. S., and the lessor make livery to the lessee *secundum formam chartæ,* this livery is void because during the life of I. S. his right heir cannot take (for *nemo est haeris viventis*), and in that case the freehold shall not remain in the lessor, and expect the death of I. S. during the term; for although I. S. die during the term, yet the remainder is void, because the livery of seisin cannot expect. And they say further that seeing all the books aforesaid [217b] prove that such a condition is good, and that the livery made to the lessee is effectual, by consequence the freehold and inheritance must pass presently or not at all. And it is not rare, say they, in our books that words shall be transposed and marshalled so as the feoffment or grant may take effect.

Condition or Declaration of Use.

ANON., 31 Hen. 8.—A. D. 1539.—Brooke's New Cases pl. 152, Bro. Abr., t. Conditions 191.

By many, if a man makes a feoffment in fee to intent to perform his will, this is not a condition but a declaration of the purpose and will of the feoffor, and the heir may not enter for non performance.

RAWSON v. INHABITANTS OF SCHOOL DISTRICT NO. 5 of UXBRIDGE,

in Mass. Sup. Jud. Ct., Oct. 1863—89 Mass. (7 Allen) 125, 83 Am. Dec. 670.

Writ of entry. Demandant claimed by deed made by the heir of Daniel Taft after entry for breach of condition in the deed by Daniel in 1837 to the town of Uxbridge "to their only proper use, benefit and behoof, for a burying place forever." The town had sold the premises in 1860 to the tenants who used them for school purposes. Judgment for demandant and the tenants appeal.

BIGELOW, C. J. The construction of the deed from the demandant's ancestor to the town of Uxbridge is not free from difficulty; but upon careful consideration we are of opinion that, adhering in its interpretation, as we are bound to do, to the strict rules of the common law respecting grants of real property, we cannot construe it as a deed upon condition.

It is said in Shep. Touchstone, 126, that "to every good condition is required an external form;" that is, it must be expressed in apt and sufficient words, which according to the rules of law make a condition; otherwise it must fail of effect. This is especially the rule applicable to the

construction of grants. A deed will not be construed to create an estate on condition, unless language is used which, according to the rules of law, *ex proprio vigore,* imports a condition, or the intent of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated. Conditions subsequent are not favored in law. If it be doubtful whether a clause in a deed be a covenant or a condition, courts of law will always incline against the latter construction. Conditions are not to be raised readily by inference or argument. Co. Litt. 205 *b,* 219 *b;* 4 Kent Com. (6th ed.) 129, 132; Shep. Touchstone, 133; *Merrifield* v. *Cobleigh,* 4 Cush. 178, 184.

In the deed on which the present controversy arises there are, strictly speaking, no words of condition, such as of themselves import the creation of a conditional estate. The usual and proper technical words by which such an estate is granted by deed are, "provided," "so as" or "on condition." Lord Coke says, "Words of condition are *sub conditione, ita quod, proviso.*" *Mary Portington's case,* 10 Co. 42 *a;* Co. Litt. 203 *a,* 203 *b.* So a condition in a deed may be created by the use of the words *"si"* or *"quod si contingat,"* and the like, if a clause of forfeiture or reentry be added. Co. Litt. 204 *a,* 204 *b. Duke of Norfolk's case,* Dyer, 138 *b.* 1 Wood on Conveyancing, 290. In grants from the crown and in devises, a conditional estate may be created by the use of words which declare that it is given or devised for a certain purpose, or with a particular intention, or on payment of a certain sum. But this rule is applicable only to those grants or gifts which are purely voluntary, and where there is no other consideration moving the grantor or donor besides the purpose for which the estate is declared to be created. But such words do not make a condition when used in deeds of private persons. If one makes a feoffment in fee *ea intentione, ad effectum, ad propositum,* and the like, the estate is not conditional, but absolute, notwithstanding. Co. Litt. 204 *a;* Dyer *ubi supra;* 1 Wood on Conveyancing, 290; Shep. Touchstone, 123. These words must be conjoined in a deed with others giving a right to reenter or declaring a forfeiture in a specified contingency, or the grant will not be deemed to be conditional. It is sometimes said that the words *"causa"* and *"pro,"* when used in deeds, create a condition; that is, where a deed is made in express terms for a specific purpose, or in consideration of an act to be done or service rendered, it will be interpreted as creating a conditional estate. But this is an exception to the general rule, and is confined to cases where the subject-matter of the grant is in its nature executory; as of an annuity to be paid for service to be rendered or a right or privilege to be enjoyed; in such case if the service be not performed or the enjoyment of the right or privilege be withheld which formed the consideration of a grant, the grantor will be relieved from the further execution of the grant, to wit, the payment of the annuity. Shep. Touchstone, 124; *Cowper* v. *Andrews,* Hob. 41; Co. Litt. 204 *a.* But ordinarily the failure of the consideration of a grant of land, or the non-fulfillment of the purpose for which a conveyance by deed is made, will not of itself defeat an estate. The reason for this distinction

between the two classes of cases is, as stated by Coke, "that the state of the land is executed and the annuity executory." Co. Litt. 204 *a*. There is one other class of grants which are sometimes said to be conditional; as when a feoffment is made *ad solvendum,* "for the matter shows that the intent of the feoffor was to have the land or the money;" or a grant *ad erudiendum filium,* "because the words purport that the instruction is to be given, or the feoffment will be void." It may be doubtful whether such words do operate in strictness as a condition. The latter case is stated in the Touchstone doubtfully, in this wise: "Some have said this estate is conditional." But if grants so expressed can be construed to create a condition by which to defeat an estate on breach and entry, it is clear that such an interpretation of them is confined to cases where the whole consideration of the grant is the accomplishment of a specific purpose, and the enjoyment of the estate granted is clearly made dependent on the performance of an act or the payment of money for the use or benefit of the grantor or his assigns. We believe there is no authoritative sanction for the doctrine that a deed is to be construed as a grant on a condition subsequent solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not enure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled.

If it be asked whether the law will give any force to the words in a deed which declare that the grant is made for a specific purpose or to accomplish a particular object, the answer is, that they may, if properly expressed, create a confidence or trust, or amount to a covenant or agreement on the part of the grantee. Thus it is said in *The Duke of Norfolk's case,* Dyer, 138 *b,* that the words *"ea intentione"* do not make a condition but a confidence and trust. See also *Parish* v. *Whitney,* 3 Gray, 516, and *Newell* v. *Hill,* 2 Met. 180, and cases cited. But whether this be so or not, the absence of any right or remedy in favor of the grantor under such a grant to enforce the appropriation of land to the specific purpose for which it was conveyed, will not of itself make that a condition which is not so framed as to warrant in law that interpretation. An estate cannot be made defeasible on a condition subsequent by construction founded on an argument *ab inconvenienti* only, or on considerations of supposed hardship or want of equity.

In the light of these principles and authorities we cannot interpret the words in the deed of the demandant's ancestor, which declare that the premises were conveyed "for a burying-place forever," to be words of strict condition. Nor can we gather from them that they were so intended by the grantor. The grant was not purely voluntary. It was only partially so. It was not made solely in consideration of the love and affection, which the grantor bore towards the grantees, but also "for diverse other valuable considerations me moving hereunto." Previously to the time of the grant, the premises had been used for a burial-place.

It is so described in the deed. Under what circumstances this had been done does not appear. It may have been for a compensation. We cannot now know, therefore, that the sole cause or consideration which induced the grantor to convey the estate to the town was, that it should be used for the specific purpose designated in the deed. There can be no doubt of the intent of the grantor that the estate should always be used and appropriated for such purpose. This intent is clearly manifested; but we search in vain for any words which indicate an intention that if the grantees omitted so to use them, and actually devoted them to another purpose, the whole estate should thereupon be forfeited, and revert to the heirs of the grantor. The words in the deed are quite as consistent with an intent by the grantor to repose a trust and confidence in the inhabitants of the town, for whom he declared his affection and love, that they would always fulfill the purpose for which the grant was made, so long as it was reasonable and practicable so to do, as they are with an intent to impose on them a condition which should compel them, on pain of forfeiture, to maintain the premises as a burial place for all time, however inconvenient or impracticable it might become to make such an appropriation of them. Language so equivocal cannot be construed as a condition subsequent without disregarding that cardinal principle of real property already referred to, that conditions subsequent which defeat an estate are not to be favored or raised by inference or implication.

Judgment for the tenants.

Rule to Distinguish Condition from Covenant.

SIMPSON v. TITTERELL, in the Common Pleas, Trinity, 33 Eliz.—A. D. 1592.—Cro. Eliz. 242.

Ejectione Firmae. B let land to defendant for years: *provided always and it is further covenanted,* that the lessee shall not assign. The lessee assigned; the lessor entered, and let it to the plaintiff. Were the words a condition or a covenant only?

All the Justices held it was a good condition to defeat the estate. PERIAM, J., said *proviso* always implies a condition if there be not words subsequent which change it into a covenant as where there is another penalty annexed to it for non-performance, as *Dockrey's Case,* 27 Hen. 8, pl. 14.

But it is a rule in provisoes where the proviso is that the lessee shall perform or not perform a thing, and no penalty to it, this is a condition, otherwise it is void. But if a penalty is annexed it is otherwise. To which the rest of the justices agreed. And it was adjudged for the plaintiff that the entry was lawful.

HORNER v. CHICAGO, M. & ST. P. RY. CO., Wis. Sup. Ct., Aug. Term, 1875.—38 Wis. 165.

Appeal by defendants from judgment for plaintiff in an action to recover land conveyed to defendant's grantor by plaintiff's grantor by deed "in consideration of one dollar," reciting that: "The aforesaid piece

or parcel of land hereby conveyed to the party of the second part only for depot and other railroad purposes." The defendant had remained in possession of the land for ten years after receiving the deed, and no depot had ever been built thereon.

LYON, J. It is claimed on behalf of the plaintiff, that the clauses in the deed from Mary E. Watson (plaintiff's grantor) to the Milwaukee & Horicon R. Co. expressing the purposes for which the lands conveyed thereby were to be used, are conditions subsequent, a breach of which might work a forfeiture of such lands. The action is brought upon that theory, and the most important, if not the controlling question to be determined, is whether those clauses are conditions. The principles or rules of law which are believed to be conclusive upon that question will be briefly stated:

1. Although there are technical words, which, if used in a conveyance, unmistakably create a condition, yet the use thereof is not absolutely essential to that end, and a valid condition may be expressed without employing those words.

2. It is not essential to a valid condition that, in case of a breach thereof, a right of re-entry be expressly reserved in the deed, or that it be expressed therein that the estate of the grantee shall terminate with the breach of the condition.

3. Neither does the character of the clause alleged to be a condition depend upon its insertion in any particular part of the instrument. "Conditions regularly follow the *habendum* in a deed, but are good in law in any other place." Jacob Law Dict. " Condition."

4. The construction of the clause or stipulation must depend upon the intention of the parties to be gathered from the instrument and the existing facts. Says Chancelor Kent in 4 Com. 132: "Whether the words amount to a condition or a limitation or a covenant may be matter of construction depending on the contract. The intention of the party to the instrument, when clearly ascertained, is of controlling efficacy; though conditions and limitations are not readily to be raised by mere inference and argument. The distinctions on this subject are extremely subtle and artificial; and the construction of a deed as to its operation and effect, will after all depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in a given case."

5. When the deed does not expressly provide for a forfeiture of the estate or give a right of re-entry in case of default, words of limitation or restriction are sometimes, perhaps usually, necessary to create a condition. For want of these in the lease in *Brugman* v. *Noyes,* 6 Wis. 3, the instrument was held not to contain a condition or covenant.

6. In a voluntary conveyance words may be held to be a condition which if used in a conveyance for a valuable consideration would be held a covenant only.

7. Conditions subsequent are not favored in the law and are to be strictly construed.

8. To the foregoing may be added the following rule prescribed by statute: "When any conditions annexed to a grant or conveyance of lands are merely nominal, and evince no intention of actual and substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded, and a failure to perform the same shall in no case operate as a forfeiture of the lands conveyed subject thereto." R. S. ch. 83, sec. 46.

9. Although a deed contain a clause declaring the purpose for which it is intended the granted premises shall be used if such purpose will not inure specially to the benefit of the grantor, but is in its nature general and public, and if there are no other words in the grant indicating an intent that the grant is to be void if the declared purpose is not fulfilled, such a clause is not a condition subsequent. The application of this rule controlled the cases of *Strong* v. *Doty*, 32 Wis. 381; and *Rawson* v. *Inhabitants*, 7 Allen 125, cited and relied on by the defendants.

The foregoing rules are, it is believed, fully sustained in the elementary treatises and by numerous adjudged cases. Many of these will be found cited in the briefs of the learned counsel on both sides. Further citation of authorities on these subjects is not deemed necessary. It remains to be determined in the light of the above rules of law, whether the deed from Mary E. Watson to the Milwaukee & Horicon R. Co., conveyed an absolute fee in the lands in controversy, or only a conditional fee. The deed conveyed two parcels of land. After the description of the first parcel, and referring to it, are the following words: "The aforesaid piece or parcel of land hereby conveyed to the party of the second part only for depot and other railroad purposes." And after the description of the other parcel, which in terms is granted for a railway, the deed contains this clause: "Both of said pieces or parcels being granted solely for said road purposes." The words *only*, quoted, and *solely*, quoted, are words of restriction and exclusion. As used in this deed their effect clearly is to prohibit the grantee from using the lands for any other than the specified purposes. The grantor owned a tract of land suitable for building purposes, adjacent to the land conveyed for a depot site. She believed, as she well might, that the construction of the railroad and the location and erection of the depot at that point, would enhance the value and facilitate the sale of her property. Hence she was willing to donate, and did donate, the land in controversy to the railroad for the purpose specified in the deed, and no other.

But it is argued that parol evidence was improperly admitted to prove that no consideration was actually paid for the land. It is claimed that because the deed recites a consideration of one dollar, it is a verity in the case that the grantor received one dollar for the land. We do not stop to inquire whether this position is correct or otherwise; for we think that it was competent for the plaintiff to prove by parol evi-

dence, not for the purpose of showing the deed void in its inception, but as a circumstance bearing on the intention of the parties, and as aiding in a correct interpretation of the instrument, that the construction of the railroad, and the location of the depot on the granted premises, were the principal inducements to the execution of the deed. See *Hanna* v. *Oxley,* 23 Wis. 519 and cases cited. It may be further remarked on this subject that if substance be regarded rather than form, the distinction in principle between paying for the land a mere nominal consideration and paying nothing at all for it is not very apparent. It is a very significant fact in the case that the grantor (acting through her agent, Mr. Horner) refused to execute an unconditional conveyance of the land, and required the clauses under consideration to be inserted in the conveyance which she did execute. But their insertion was a useless act unless the clauses are held to be conditions. That the grantor intended to reserve to herself some remedy in case the grantee should make default, is too plain for argument. * * *

It must be held, therefore, that the parcel of land first described in the deed was conveyed upon condition that the grantee should use it for depot purposes, and the parcel last described upon condition that it should be used "for a railway," that is, as we undersand it, the railway track should be laid upon it. And here it may be observed that we do not think that the first condition in the deed applies to the second parcel of land therein described. That is to say, we do not think the failure to use the land first described for depot purposes can alone work a forfeiture of the strip conveyed "for a railway." Having regard to the rule above stated and that these conditions are to be strictly construed, we must construe them the same as though two deeds had been made, one conveying the depot lot on condition that it be used for depot purpose, and the other conveying the strip two and a half rods wide on condition that it be used for a railway track. The track having been laid upon such strip of land in 1857 or 1858, and having been maintained there until the present time, it necessarily follows from the views just expressed, that there has been no breach of the condition upon which the same was conveyed, and hence that the circuit court erred in rendering judgment therefor for the plaintiff. But the failure to use the other parcel for depot purposes, evidenced by the erection and maintenance, by the grantee and its successors, of the depot for Ripon eighty rods south of such parcel and separated from it by a mill pond, was injurious to the grantor and a substantial breach of the condition upon which such parcel was conveyed.

We are next to determine whether the grantor, before she conveyed to the plaintiff, made entry for condition broken, upon the land conveyed for depot purposes. Without recapitulating the testimony on that subject, we think the fact is established by a clear preponderance of the evidence that in 1862 or 1863 the grantor, by her agent, made sufficient entry thereon to revest in her the title to such parcel. * * *

By the Court: The judgment of the circuit court is reversed, and the

cause remanded with directions to that court to give judgment for the plaintiff, modified as indicated in this opinion.

Conditions and Limitations Distinguished.

NEWIS et ux. v. LARK and HUNT, in C. B., Mich. 13 & 14 Eliz.—A. D. 1572.—Often Cited as SCOLASTICA'S CASE, and Reported in 2 Plowd. Com. 403, and Partially in N. Bendlows 196. Abridged from Plowd. Com.

Assize of novel-disseizin by Robert Newis and Scolastica his wife against William Lark and John Hunt for land in Middlesex. The assize was taken by default; and plaintiff gave evidence to prove, that Henry Clerk, seised in fee of the land in question, made his devise in writing, whereby he gave it to his son John in tail, remainder to his son Francis in tail, remainder to the plaintiff Scolastica his daughter in tail, with remainders over; and in this writing he declared his will that if any of those to whom the land was so given should sell, waste, mortgage, or discontinue the lands, or their interest or possibility or any part of it, or unlawfully vex or disquiet any to whom such lands were so given, the persons and their heirs so doing shall from thenceforth be clearly discharged and excluded from the entails to him or them, and from all benefit and advantage as if they had never been mentioned in the will: that after the death of the testator Francis and John joined in a covenant to levy a fine and suffer a recovery to the defendants herein, which fine was levied and recovery suffered accordingly; and that afterwards the plaintiffs entered claiming by force of the will, on whom the defendants re-entered whereupon this suit was brought. Defendants demurred in law to the evidence, and the plaintiffs joined in the demurrer. Afterwards the matter was argued at the bar and by all the judges.

Opinion of the Court. It was held by all the justices that the bargain, fine, and recovery are such acts as give title and occasion to defeat the estates tail limited to John and Francis. But the great doubt was whether the penalty which the testator had added be a condition, or a limitation and no condition, and how it stands with law, and who shall take advantage of it, and by what means.

All the justices argued that it is no condition; for if it should be a condition and should be broken by any in possession or in remainder, then the heir, to whom the privity of conditions in inheritances descends, should enter, and thereby defeat all the estates. For if a man makes a lease for life, remainder in tail, remainder in tail, remainder in fee, upon condition that some of them in the remainder shall do such an act, there, if it is not done the feoffor and his heirs may enter, and thereby defeat as well the estate in possession as all the remainders; for he that re-enters for a condition broken is in of such estate as he had before the condition made, from whence it follows that he has defeated all the estates. But here it was not the devisor's intent that all the estates-tail should be utterly defeated, for in his declaration and discourse, made after the limitation of the estates-tail he expresses that his mind was,

that the said hereditaments should continue in the name of the Clerks, to the memorial of his own name; and besides this he declares, that if any of them attempt any act contrary to his limitation, the tenements shall come to the party next in tail, as if such disorderous person had never been mentioned in his will. From which clauses it manifestly appears to all to be his intent that the estate tail of one should not be defeated by the act of another, and the words of every man expressed in his will shall be taken and expounded according to his intent and meaning, from whence it follows that the penalty expressed shall not be a condition to defeat all the other estates. And hereupon the case in 29 Assize pl. 17, was cited by HARPER and DYER, [JJ.,] where a man seized in fee of lands devisable devised them to one for term of his life, and that he should be chaplain, and should sing for his soul all his life, so that after his death the said tenements should remain to the commonalty of the same town, to find a chaplain perpetual for the same tenements, and he died; and the devisee, being of sufficient age to be a chaplain, entered into the tenements, and held them for six years, but was no chaplain, and the heir of the devisor ousted him, and the devisee brought an assize, and the heir pleaded to the assize, and all this matter was found by the assize, and the justices encouraged the assize as much as they could to find for the plaintiff, and at last they said that the plaintiff was seised and disseised; for there it seemed to the court that the limitation that he should be chaplain and should sing for him was no condition, for the breach whereof the heir might enter, for if he might enter, thereby the remainder would be defeated, and it appears that it was not the intent of the devisor to defeat the remainder, because it was given to find a chaplain perpetual, and the chaplain could not be found perpetually if the remainder was annulled. From whence it appears that the words in a will which seemingly tend to a condition, shall not in the law be taken for a condition, when it appears to be the intent of the party that the whole estate shall not be defeated. So here the words of the penalty shall not make a condition to defeat all the estates.

Another reason was also given in proof thereof, and that was, because the tail was first appointed to John Clerk, who was his eldest son and heir, and it was the intent of the devisor that he should be restrained from discontinuing or barring his tail, as well as any of the others, and if it should be taken to be a condition, and that there was no other penalty for the breach of it but entry only, then if the eldest son himself, who is donee and heir, makes a feoffment, thereby the condition is extinct, for the title of the condition passes in the land, so that he cannot enter for the condition broken by himself contrary to his own feoffment, and as he is at liberty to make a feoffment, so is he to suffer a recovery, and thereby to bar all the remainders, which would be contrary to the intent of the devisor, who had a mind that he should be restrained as well as the others; and therefore, if his intent may hold place, it shall not be a condition, but there shall be some other penalty to the eldest son which is greater to him than a condition carries along with it if he

breaks the intent of the devisor. And so all the justices unanimously agreed that it was not a condition which implies a re-entry.

Further it was moved that if the penalty shall not amount to a condition containing a re-entry, whether or not it shall be a limitation in estate, and if it be a limitation, whether entry is necessary before it be ended, and whether the next in remainder be privy enough to make entry. For LORD DYER, J., said, if a man makes a gift in tail, upon condition that if the donee does such an act his estate shall cease. *Frowick* [C. J.] holds in 21 Hen. 7, 12 a, that if he does the act, his estate shall not cease before entry, because it is an estate of inheritance which shall not cease by parol without an entry in fact.

And as to this, all the justices argued that the clause in the will which said: "That the person mortgaging or entangling shall be clearly discharged excluded and dismissed touching the entail, and that the conveyance of the entail shall be of no force benefit or advantage towards him or them," shall be taken and expounded in law as a limitation, that is to say, it shall be taken in sense to be a devise to him in tail until he mortgage, alien, pledge, entangle, incumber, or do the other acts there expressed, and when he shall do any of these acts then the estate shall end as fully as if he died without issue male; so that after the acts done the right of the tail shall cease, and the tail is merely dissolved; for when the intent is shown by words and the words are not aptly put, then such sense ought to be put on the words as is suitable to the intent; and for as much as in sense such words amount to a limitation, and especially when the case is upon a devise, where the intent only is regarded, and the words, although they are not apt in law for the matter, shall be drawn to the intent. For as HARPER, J., said, the devisor shall be accounted *inops consilii*, because men most commonly make their wills when they are at the point of death, and have not time to seek counsel; for which reason the law shall be their counsel and shall interpret the words, and direct the operation of them according to the intent of the party.

And each of the justices cited the last case which Fitzherbert puts in the writ of *ex gravi querela* in his Natura Brevium, 201 o, which is thus: A man devises land in London to his wife for life, upon condition that if she marries the land shall remain to his son in tail, and for the default of such issue the remainder to the right heirs of the donor in fee; the wife takes husband, and she and the husband occupy the land, he in remainder dies without heirs of his body; the right heir of the donor shall have a special writ of *ex gravi querela* directed to the mayor and sheriffs of London, rehearsing this special devise and the said matter, commanding them to call the parties and hear them, &c., and to do right: So he says, it appears that he in remainder shall have advantage of the condition if it be broken, but that shall be by the way of suing this action and not of entry by force of the condition not performed; and the said writ appears in the register, and all this appears in the said *Natura Brevium*. And the justices said that the words of the condition there mentioned are not properly a condition, but words of limitation. But DYER, J., said

that where it seemed to Fitzherbert in that case that the heir of the donor might not enter, in his opinion he might well enter.

And HARPER, J., also cited the case in 34 Edw. 3, Fitz., formedon pl. ult. 4, where a man had issue a son and a daughter and devised land devisable to one for life, upon condition that if the son disturbed the tenant for life, or the executors of their administration, then the land should remain to the daughter; and he died and the daughter, after the death of the tenant for life, brought a formedon in remainder against the son, and alleged that he had disturbed the tenant for life and the executors, and the son traversed it and thereupon issue was joined. So that there the condition took away the fee out of the son, and put it in the daughter by allowance of the law, in order to perform the intent of the devise, although the remainder did not vest when the first estate took effect.

And all the justices agreed upon the matter in law, viz., that the said clause of restraint shall be a limitation which shall determine the estate, and not a condition requiring re-entry, and that by the said acts, viz., the bargain, fine, and recovery, the estates tail ended, and that the plaintiffs might enter, and should not be driven to any formedon or other suit, as they should be upon discontinuance of any other estate tail general by feoffment or fine, and by dying without issue after; for here the estate ended by collateral limitation, so that the act which ends the estate by the limitation cannot make a discontinuance; for the doing of the act and the end of the estate come together, at one and the same instant; for the fine levied by John determined his interest, and was no discontinuance to Francis, because the estate tail of John was not *in esse* longer than the fine took effect, and it being determined could not be discontinued as to him, or the other, or him in remainder, and the recovery determined the estate of Francis which preceded, and so there is no discontinuance to retard the entry of the plaintiffs.

This is believed to be one of the first cases in which the rules to distinguish conditions from limitations are fully discussed; and in this respect it has been followed and much cited since. But in so far as it holds valid provisions creating forfeitures on alienations or attempts to alienate, it was soon overruled. See Corbit's Case, post 172; and Mary Portington's Case, ante 45.

In Mary Portington's Case, 10 Coke 41, Lord Coke says: "The authority of the book of 29 Assize 17, is against that which was cited in Scholastica's Case; and thereby you may see, good reader, how dangerous it is to ground an opinion upon any abridgement; for Fitzherbert, in abridging the case abridges it without any words of express condition, as cited in Scholastica's Case. But Brooke, tit., 'Condition,' abridges it to be upon express condition. And as to the said case in F. N. B. it is cited in Scholastica's Case in this manner [stating as above]; which case so put by Fitzherbert out of the original writ in the register is utterly mistaken in two points: 1, because the devise to the wife in the case put in F. N. B. was upon express words of condition; but inspecto registro fo. 246, the devise was upon apt words of limitation * * * ; 2, where Fitzherbert saith that the right heir cannot enter, it is clear that the right heir may well enter, because he has the reversion by descent, and not by way of remainder."

Scholastica's Case was followed on similar facts in Sharington v. Minors,

in B. R., Pasch. 41 Eliz., Moore 543, on the opinions of Fenner, Gawdy, and Clench, JJ., against the opinion of Popham, C. J.,who relied on Germin v. Arscot, post.

The question was involved and argued at bar and bench in B. R. Mich. 39 & 40 Eliz., in Tarrant's Case, Moore 470; but because of the difference of opinion among the judges no decision was reached in that case at that time.

See the discussion as to the distinction between a condition and a limitation in Willion v. Berkley, ante p.

WELLOCK v. HAMMOND, in Queen's Bench, Trinity, 32 Eliz.—A. D. 1591, Cro. Eliz. 204.

Trespass. The case upon special verdict was; Thomas Wellock, copyholder in fee of land of nature of borough English, descendible to the younger son and younger brother, had issue four sons and a daughter, and surrendered the land to the use of his will, and devised it to his wife for life, remainder to his eldest son, *paying* forty shillings to each of his brothers and sister within two years after the death of the wife, and died. The wife entered and died. The eldest son entered and did not pay the legacies within two years, but within five years he did pay them. The youngest son died without issue. The oldest then surrendered the land to the use of his will, devised it to his wife, and died. She entered and married defendant. A younger son of Thomas entered, defendant ousted him, he brought trespass, and it was found that the land was worth 4£ per annum. The question was whether the entry was lawful.

Godfrey and *Coke,* for the plaintiff, argued that the oldest was given only a life estate, since 8£ was too small a consideration to make a fee-simple on a devise without limitation; that the word *paying* was a limitation, because void as a condition, being descendible to the heir.

Shirley and Johnson, for the defendant, argued; that the devise was in fee because of the consideration, and the value was not material, citing 29 H. 8, Brooke's Abr., "Testaments" 18; 6 Edw. 6, Brooke "Estates" 78; Abr. 38 Edw. 3, 14; that the words were sufficient and apt to make a condition; that it cannot be a limitation because the lands are limited to another if he did not pay; and whether condition or limitation, it is not found that there was any demand for the money and so no breach.

PER CURIAM:—It is a fee, for the value is not material, and no book speaks of the value. It is a limitation, and not a condition; for if it be a condition it extinguisheth in the heir, and no remedy for the money. But being a limitation, the law shall construe it that upon the non-payment of the money his estate shall cease, and then the law shall carry it to the heir by custom, without any limitation over. And in a devise it may well be that an estate in fee shall cease in one, and shall be transferred to another. The money was to be paid without request. And it was adjudged for the plaintiff. See 3 Coke 20 b.

HARDY v. SEYER, in Queen's Bench, Easter, 37 Eliz.—A. D. 1596.—Cro. Eliz. 414. Abridged.

Ejectione Firmae. Upon special verdict. A lease was made to a widow for forty years, upon condition that during the time she remain sole and live in the house. She continued unmarried in the house all her life, but died within the forty years. The question between the executor of the widow and him in reversion was whether the term was determined. If these words were a condition the term remains, for she performed it till it became impossible by act of God, which shall not turn to her prejudice; but if it is a limitation it is otherwise.

POPHAM [C. J.] and GAWDY and CLENCH [JJ.] held that the words, *upon condition that if,* &c. were void words; for they are insensible, and are neither condition nor limitation; for all conditions shall be taken strictly, and no words shall be supplied by intendment to make a condition to divest or destroy an estate. And so here it is no more than that a man makes a lease for years rendering rent—on condition that if the rent be not paid—and says no more, which is without sense; for it may be intended that he shall forfeit a pain, or that the lessor shall re-enter, which is uncertain. Every *that if* ought to be answered by the words *what then,* whereby to make the intention of the parties full, what shall be done, otherwise we cannot judge of their intention: and for this uncertainty it is void, and the lease is absolute. But if the words were that the lease was for forty years, "if she so long live unmarried and inhabit therein," POPHAM [C. J.], held it to be a limitation, and to determine the lease by her marriage or death, so that she cannot inhabit therein: and so *Bromley* [of counsel for the reversioner] affirmed was the intent of the parties, and the truth of the case, and that it was mistaken in drawing the verdict. But FENNER, J., held that the words are full enough to make a condition of re-entry without any other, and are a condition and not a limitation, and that this condition is well performed, and the lease remains absolute. Wherefore it was adjudged for the plaintiff.

HAYNSWORTH v. PRETTY, in Queen's Bench, Hilary 41 Eliz.—A. D. 1599. —Cro. Eliz. 833, Moor 644.

Trespass. Special verdict. One seised of lands in socage had issue two sons and a daughter, and devised to his second son and daughter 20*l.* to be paid by his eldest son, and devised his land to his eldest son in fee, on condition that if he paid not these legacies, that his land should be to his second son and daughter and their heirs. The eldest son fails of payment. Whether the younger son and daughter shall have the land was the question. After argument it was *resolved* by the Court clearly, that they should have it; for the first devise to his son and heirs in fee, being no more than what the law gives, is void; and it is but a future devise to the second son and daughter upon the eldest son's default of payment. The case is no other but as if one had devised that if his eldest son did not pay all legacies, that his lands should be to the legatees,

and there is no doubt but that in default of payment the land should vest in them. GAWDY and FENNER [JJ.] held that if it were a good devise to the eldest son, yet this condition is a limitation of his estate, and shall give it to the second son and daughter upon default of payment. wherefore it was adjudged accordingly for the plaintiff.

For neglect to enter judgment, the case was reargued and again adjudged for the defendant, for the same reasons. Cro. Eliz. 919.

WRENFORD v. GYLES, in Common Bench, Mich. 40 & 41 Eliz.—A. D. 1600. —Cro. Eliz. 643, Noy 70.

A lease was made for 21 years if the lessee lived so long and continued in the lessor's service. The lessor died, and whether the term was determined was the question.

ANDERSON, [C. J.], OWEN and GLANVILLE, [JJ.], held that the lease continued, for there is not any laches in the lessee that he did not serve; but it is the act of God that he cannot serve any longer; and it is like to *Sir Thomas Wroth's Case.* [Dyer 167, Plowd. Com. 454.] But WALMSLEY [J.] strongly against it: because it is a limitation to the estate, that it shall not continue longer than he serves. *Quaere.*

HENDERSON v. HUNTER, In Pa. Sup. Ct., 1868, 59 Pa. St. 335, Pattee's Cas. R. P. 258, Tiedman's Cases on R. P. 229. Gate's Cases R. P. 149.

AGNEW, J. This was an action of trespass by church trustees under a deed of trust made by Thomas Pillow in 1836, for taking down and removing the materials of a church building in 1867. The case turns on the limitation in the deed. The legal estate of the trustees clearly has no duration beyond the use it was intended to protect. The word "successors" is used to perpetuate the estate, but as the trustees are an unincorporated body having no legal succession, there is nothing in the terms of the grant to carry the trust beyond its appropriate use. This brings us to the limitation of the use itself.

It is for the erection of "a house or place of worship for the *use* of the members of the Methodist Episcopal Church of the United States of America (so long as they use it for that purpose, and no longer, and then to return back to the original owner), according to the rules and discipline which from time to time may be agreed upon and adopted by the ministers and preachers of the said church at their General Conference in the United States of America." This is the main purpose of the trust, the other portions of the deed relating to the use being ancillary only to this principal object. The interjected words, "so long as they use it for that purpose and no longer, and then to return back to the original owner," are terms of undoubted limitation, and not of condition. They accompany the creation of the estate, qualify it, and prescribe the bounds beyond which it shall not endure.

The equitable estate is in the members of the church so long as they use the house as a place of worship in the manner prescribed and no

longer. This is the boundary set to their interest, and when this limit is transcended the estate expires by its own limitation, and returns to its author. The words thus used have not the slightest cast of a mere condition. No estate for any fixed or determinate period had been granted before these expressions were reached, and they were followed by no proviso or other indication of a condition to be annexed.

"A special limitation," says Mr. Smith, in his work on Executory Interests, p. 12, "is a qualification serving to mark out the bounds of an estate, so as to determine it *ipso facto* in a given event without action, entry, or claim, before it would, or might, otherwise expire by force of, or according to, the general limitation." A special limitation may be created by the words "until," "so long," "if," "whilst," and "during," as when land is granted to one *so long* as he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents he shall have made £500. 2 Black. Com. 155; Smith on Exec. Int. 12; Thomas Coke, 2 vol., 120-21; Fearne on Rem. 12, 13 and note p. 10. "In such case," says Blackstone, "the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the £500), and the subsequent estate which depends on such determination becomes immediately vested, without any act to be done by him who is next in expectancy."

The effect of the limitation in this case was that the estate of the trustees terminated the moment the house ceased to be used as a place of worship according to the rules and discipline of the church, by the members to whose use in that manner it had been granted; and the reversion *ipso facto* returned to Thomas Pillow, the grantor. The abandonment of the house as a place of worship, therefore, became a chief question in the cause, because the title of the trustees to the property, and consequently their right to maintain this action, hinged upon this event. Then, as the use of the members of this church was to be according to the rules and discipline from time to time adopted by the general conference, it became a question whether the alleged abandonment of the house as a place of worship was by church authority, and according to the rules and discipline then existing; for a mere temporary suspension of services there, or a discontinuance of the use without authority, would not, *ipso facto,* determine the use. Hence an inquiry both into the fact of abandonment and the authority of the church became essential. * * *

The fact of such an abandonment was submitted by the judge and found by the jury. In his charge the learned judge submitted the question on the testimony of the presiding elder and the book of discipline as to the authority for so doing; and on his testimony and that of others as to the actual discontinuance of services there and the causes thereof. This was all he could do, as the question of fact belonged to the jury. * * *

Judgment affirmed.

Impossibility of Performance.

THOMAS v. HOWELL, in King's Bench, Trinity 4 Wm. & Mary.—A. D. 1693.—1 Salk. 170, 25 Eng. Rul. Cas. 626.

One devised to his eldest daughter upon condition she would marry his nephew on or before she attained the age of 21. The nephew died young, and the daughter never refused, and indeed never was required to marry him. After the death of the nephew, the daughter, being about 17, married J. S. And it was adjudged in C. B. that the condition was not broken, being become impossible by the act of God; and the judgment was afterwards affirmed in error in B. R.

Right of Entry when not Expressly Reserved.

LITTLETON'S TENURES. Littleton died in 1482.

§ 331 * * * It is commonly used in all such cases as aforesaid to put the clauses in the deeds, *scilicet,* if the rent be behind, &c., that it should be lawful to the feoffor and his heirs to enter, &c., and this is well done, for this intent, to declare and express to the common people, who are not learned in the law, of the manner and condition of the feoffment &c., As if a man seised of land letteth the same land to another by deed indented for a term of years, rendering to him a certain rent, it is used to put into the deed, that if the rent be behind at the day of payment, or by the space of a week or month, &c. that then it shall be lawful to the lessor to distrain, &c., yet the lessor may distrain of common right for the rent behind, &c., though such words were not put into the deed, &c.

Who May Enter for Condition Broken.

LITTLETON'S TENURES (Littleton died in 1482).

§ 346. And here note two things: one is that no rent (which is properly so called) may be reserved upon any feoffment, gift, or lease, but only to the feoffor, donor, or lessor, or to their heirs, and in no manner may it be reserved to any strange person. But if two joint-tenants make a lease by deed indented, reserving to one of them a certain yearly rent, this is good enough to him to whom the rent is reserved, for he is privy to the lease and not a stranger.

§ 347. The second thing is that no entry nor re-entry (which is all one) may be reserved or given to any person but only to the feoffor, donor, or lessor, or to their heirs; and such re-entry cannot be given to any other person. For if a man letteth land to another for term of life by indenture, rendering to the lessor and to his heirs a certain rent, and for default of payment a re-entry, &c., if afterwards the lessor by a deed granteth the reversion of the land to another in fee, and the tenant for term of life attorn &c., if the rent be after behind, the grantee of the reversion may distrain for the rent, because the rent is incident

to the reversion; but he may not enter into the land and oust the tenant, as the lessor, or his heirs, might have done, if the reversion had been continued in them, &c. And in this case the entry is taken away forever; for the grantee of the reversion cannot enter for the reason aforesaid; and neither the lessor nor his heirs can enter, for if the lessor might enter, then he ought to be in his former estate, &c., and this may not be, because he hath aliened from him the reversion.

STATUTE 32 HENRY VIII, c. 34 (A. D. 1540).

Concerning grantees to take advantage of the conditions to be performed by the lessees.

Where before this time divers, as well temporal as ecclesiastical and religious persons, have made sundry leases, demises, and grants, to divers other persons, of sundry manors, lordships, ferms, meases, lands, tenements, meadows, pastures, or other hereditaments, for term of life or lives, or for term of years, by writing under their seal or seals, containing certain conditions, covenants, and agreements, to be performed, as well on the part and behalf of the said lessees and grantees, their executors and assigns, as on the behalf of the said lessors and grantors, their heirs and successors, (2) and forasmuch as by the common law of this realm, no stranger to any covenant, action, or condition, shall take any advantage or benefit of the same, by any means or ways in the law, but only such as be parties or privies thereunto, by the reason whereof, as well all grantees of reversions, as also all grantees and patentees of the king our sovereign lord, of sundry manors, lordships, granges, ferms, meases, lands, tenements, meadows, pastures, or other hereditaments late belonging to monasteries and other religious and ecclesiastical houses dissolved, suppressed, renounced, relinquished, forfeited, given up, or by other means come into the hands and possession of the king's majesty since the fourth day of February, the seven and twentieth year of his most noble reign, be excluded to have any entry or action against the said lessees and grantees, their executors or assigns, which the lessors before that time might by the law have had against the same lessees for the breach of any condition, covenant, or agreement comprised in the indentures of their said leases, demises, and grants; (3) be it therefore enacted by the king, our sovereign lord, the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same, that as well all and every person and persons, and bodies politic, their heirs, successors, and assigns, which have or shall have any gift or grant of our said sovereign lord, by his letters patents of any lordships, manors, lands, tenements, rents, parsonages, tithes, portions, or any other hereditaments, or of any reversion or reversions of the same, which did belong or appertain to any of the said monasteries, and other religious and ecclesiastical houses, dissolved, suppressed, relinquished, forfeited, or by any other means come to the king's hands since the said fourth day of February, the seven and twentieth year of his most

noble reign, or which at any time heretofore did belong or appertain to any other person or persons and after came to the hands of our said sovereign lord, (4) as also all other persons being grantees or assignees to or by our said sovereign lord, the king, or to or by any other person or persons than the king's highness, and the heirs, executors, successors, and assigns, or every of them, (5) shall and may have and enjoy like advantages against the lessees, their executors, administrators, and assigns, by entry for non-payment of the rent, or for doing of waste, or other forfeiture; (6) and also shall and may have and enjoy all and every such like, and the same advantage, benefit, and remedies, by action only, for not performing of other conditions, covenants and agreements, contained and expressed in the indentures of their said leases, demises, or grants, against all and every of the said lessees and farmers and grantees, their executors, administrators, and assigns, as the said lessors, or grantors themselves, or their heirs or successors, ought, should, or might have had and enjoyed at any time or times, (7) in like manner and form as if the reversion of such lands, tenements, or hereditaments had not come to the hands of our said sovereign lord, or as our said sovereign lord, his heirs and successors, should or might have had and enjoyed in certain cases, by virtue of the act made at the first session of this present parliament, if no such grant by letters patents had been made by his highness.

II. Moreover, be it enacted by authority aforesaid, that all farmers, lessees, and grantees, of lordships, manors, lands, tenements, rents, parsonages, tithes, portions, or any other hereditaments for term of years, life, or lives, their executors, administrators, and assigns, shall and may have like action, advantage, and remedy, against all and every person and persons and bodies politic, their heirs, successors, and assigns, which have or shall have any gift or grant of the king our sovereign lord, or of any other person or persons, of the reversion of the same manors, lands, tenements, and other hereditaments so letten, or any parcel thereof, for any condition, covenant, or agreement, contained or expressed in the indentures of their lease and leases, as the lessees, or any of them might and should have had against the said lessors, and grantors, their heirs and successors; (2) all benefits and advantages of recoveries in value by reason of any warranty in deed or in law by voucher or otherwise only excepted.

Section 3, giving the statute effect from the Sept. 15th following, is omitted.

"Throughout the United States and territories the subject matter of the statute of 32 Henry VIII, c. 34, has been handled in various ways. In a majority of jurisdictions, the statute has been in effect re-enacted. While the wording is always different from the original statute, the same end has probably been attained." Sims on Covenants, pp. 73-4, citing the statutes of the several states.

"The great object [of the statute] was to enable grantees of reversions to take advantage of conditions; but the grantee of a reversion was not prevented from taking advantage of a condition broken for want of privity, but because by his entry he would defeat his reversion granted to him, for by the entry the reversion would be determined, which was

deemed repugnant and contrary to the acceptance of the reversion." 3 Sugden on Vendors *467, citing 5 Hen. VII, 18b, pl. 12, reported above p.

COKE LIT. 214b-215b.—A. D. 1620-30.

Another diversity is between a condition annexed to a freehold and a condition annexed to a lease for years. For if a man make a gift in tail or a lease for life upon condition that if the donee or lessee goeth not to Rome before such a day the gift or lease shall cease or be void, the grantee of the reversion shall never take advantage of this condition, because the estate cannot cease before an entry; but if the lease had been but for years there the grantee should have taken advantage of the like condition, because the lease for years *ipso facto* by the breach of the condition without any entry was void; for a lease for years may begin without ceremony, and so may end without ceremony; but an estate of freehold cannot begin nor end without ceremony. And of a void thing a stranger may take benefit, but not of a voidable estate by entry. * * *

If a man have a lease for years and demise or grant the same upon condition, &c., and die, his executors or administrators shall enter for the condition broken, for they are privy in right, and represent the person of the dead. [215a] If *cestui que use* had made a lease for years, &c., upon condition, the feoffees should not enter for the condition broken, for they are privy in estate, but not privy in blood. Another diversity is in case of a lease for years, where the condition is that the lease shall cease, or be void as is aforesaid, and where the condition is, that the lessor shall re-enter; for there the grantee, as Littleton saith, shall never take benefit of the condition. And it is to be observed, that where the estate or lease is *ipso facto* void by the condition or limitation no acceptance of the rent after can make it to have a continuance; otherwise it is of an estate or lease voidable by entry.

Another diversity is between conditions in deed, whereof sufficient hath been said before, and conditions in law. As if a man make a lease for life, there is a condition in law annexed unto it, that if the lessee doth make a greater estate, &c., that then the lessor may enter. Of this and the like conditions in law, which do give an entry to the lessor, the lessor himself and his heirs shall not only take benefit of it, but also his assignee and the lord by escheat, everyone for the condition in law broken in their own time.

Another diversity there is between the judgment of the common law, whereof Littleton wrote, and the law at this day by force of the statute of 32 Hen. VIII, c. 34. For by the common law no grantee or assignee of the reversion could (as hath been said) take advantage of a re-entry by force of any condition. For at the common law, if a man had made a lease for life reserving a rent, &c., and if the rent be behind a re-entry, and if the lessor grant the reversion over, the grantee should take no benefit of the condition, for the cause before rehearsed. But

now by the said statute of 32 Hen. VIII, the grantee may take advantage thereof, and upon demand of the rent and non-payment, he may reenter. By which act it is provided, that as well every person which shall have any grant of the king of any reversion, &c., of any lands, &c., which pertained to monasteries, &c., as also all other persons being grantees or assignees, &c., to or by any other person or persons, and their heirs, executors, successors, and assignees, shall have like advantage against the lessees, &c., by entry for the non-payment of the rent, or for doing of waste, or other forfeiture, &c., as the said lessors or grantors themselves ought or might have had. Upon this act divers resolutions and judgments have been given, which are necessary to be known: 1. That the said statute is general, viz. that the grantee of the reversion of every common person, as well as the king, shall take advantage of conditions. 2. That the statute doth extend to grants made by the successors of the king, albeit the king be only named in the act. 3. That where the statute speaketh of lessees that the same doth not extend to gifts in tail. 4. That where the statute speaks of grantees and assignees of the reversion, that an assignee of part of the state of the reversion may take advantage of the condition. As if lessee for life be, &c., and the reversion is granted for life, &c. So if lessee for years be, and the reversion is granted for years, the grantee for years shall take benefit of the condition in respect to this word (executors) in the act. 5. That a grantee of part of the reversion shall not take advantage of the condition; as if the lease be of three acres, reserving a rent upon condition, and the reversion is granted of two acres, the rent shall be apportioned by the act of the parties, but the condition is destroyed, for that it is entire and against common right. 6. That in the king's case the condition in that case is not destroyed, but remains still in the king. 7. By act in law a condition may be apportioned in the case of a common person; as if a lease for years be made of two acres, one of the nature of borough English, the other at the common law; and the lessor having issue two sons, dieth, each of them shall enter for the condition broken; and likewise a condition shall be apportioned by the act and wrong of the lessee, as hath been said in the chapter of Rents. 8. If a lease for life be made, reserving a rent upon condition, &c., the lessor levies a fine of the reversion, he is grantee or assignee of the reversion; but without attornment he shall not take advantage of the condition, for the makers of the statute intended to have all necessary incidents observed, otherwise it might be mischievous to the lessee. 9. There is a diversity between a condition that is compulsory and a power of revocation that is voluntary for a man that hath a power of revocation may by his own act extinguish his power of revocation in part, as by levying a fine of part; and yet the power shall remain for the residue, because it is in the nature of a limitation, and not a condition; and so it was resolved in the *Earl* of *Shrewsbury's Case* in the court of wards, Easter, 39 Eliz. & Mich. 40 & 41 Eliz. 10. If the lessor bargain and sell the reversion by deed indented and enrolled, the bargainee is not in the *per* of the bargainor,

and yet he is an assignee within the statute. [215b] So if the lessor grant the reversion in fee to the use of A and his heirs, A is a sufficient assignee within the statute; because he comes in by the act and limitation of the party, although he is in the *post,* and the words of the statute be *to or by,* and they be assignees to him although they be not by him; but such as come in merely by act in law, as the lord of the villein, the lord by escheat, the lord that entereth or claimeth for mortmain, or the like, shall not take benefit of this statute. 11. If the lessor in the case before, bargain and sell the reversion by deed indented and enrolled, or if the lessor make a feoffment in fee, and the lessee re-enter, the grantee or feoffee shall not take any advantage of any condition without making notice to the lessee. 12. Albeit the whole words of the statute be for nonpayment of the rent, or for doing of waste, or other forfeiture, yet the grantees or assignees shall not take benefit of every forfeiture by force of a condition, but only of such conditions as either are incident to the reversion, as rent, or for the benefit of the estate, as for not doing of waste, for keeping the house in reparations, for making of fences, scouring of ditches, for preserving of woods, or such like; and not for the payment of any sum in gross, delivery of corn, wood, or the like, so as other forfeiture shall be taken for other forfeitures like to those examples which were there put (videlicet) of payment of rent and not doing of waste, which are for the benefit of the reversion.

ANON., 22 Edw. IV.—A. D. 1483.—Brooke Abr. t. Conditions 167, 22 Edw. IV, 17.

Debt. The master and associates of St. Bartholomews in London had granted to J. S. for life a certain corody, &c., for doing such services as N and others had done, and the grantee leased to the master and his associates for seven years rendering 10£ rent. The grantee brought debt, and the grantor said that the plaintiff had not done the services; and the plaintiff said that he was excused by reason of the lease to the grantor which is a suspense, by which it was argued that the plaintiff should be paid his rent and the corody; and see on this case 20 Edw. IV, 18, 19, BRIAN, C. J. If a man enfeoffs me on condition to pay to him 10£ on such a day or to re-enter, and I lease the land to him rendering rent, and at the day I do not pay the 10£, here he may retain the land, and the rent reserved by me is extinguished. But if a man makes a feoffment in fee rendering rent with a clause of re-entry for non-payment, if the feoffee re-enfeoff the feoffor the feoffer may not re-enter for non-payment of the rent, for he has the same land from which the rent is issuing. Contrary it is of a sum in gross as above. And the same would seem to be the law of a lease made afterwards by the lessee to the lessor for years or life, for by this the rent is suspended.

NOTA, Easter Term.—A. D. 1496.—Year Books, 11 Hen. VII, 17, pl. 14.

If I should lease for a term of years on condition that he should go to Rome such a day, and if not that his estate should cease, here if the lessor grant the reversion to another, and he attorn, and later the condition is broken, he who has the reversion may enter, for by breach of the condition the estate is void and determined; so of a term for life. But if the condition was that he might re-enter for the condition broken, and he had granted the reversion over, the grantee may not enter.

CHAWORTH v. PHILLIPS, Moor 876. About 7 Jac. 1, A. D. 1610.

It was resolved that if a lease was made on condition to be void if 10£ be not paid by a day named, the grantee of the reversion cannot enter by such condition, because it is collateral. Resolved, also, that if a lessee for 20 years make a lease for 10 years on such condition, and afterwards the lessee for 20 years surrender to him in reversion, he in reversion may not have benefit of the condition, because he is in of another estate paramount.

WARREN v. LEE, in the King's Bench, Hilary, 2 & 3 Phil. & Mary.—A. D. 1556.—Dyer 126b.

In trespass for breaking a close, by Jasper Warren against Lee and others. The defendants pleaded not guilty, and at *nisi prius* there was a demurrer in law upon the evidence. And the case was: that the father of the plaintiff was seised in fee of land holden in socage, and by his last will in writing gave the land in the premises thereof to his wife for the term of [*127a] her life, *on condition that she should provide for the said Jasper*, being the eldest son at school, *and bring him up in virtue and good morals at her own expense until he should be of the full age of 21 years;* and afterwards in the end of the will, he gave the land *after the death of his wife to his second son in tail*, reserving the fee-simple; and died. The wife entered and broke the condition; and the said Jasper, after he came of age, entered, and brought this action of trespass during the life of the wife. The question was, whether his entry was lawful or not. First, it is to be considered whether a condition can be knit to a devise or not? And it seems it may; and this by the statutes of wills 32 [Hen. 8 c. 1] and 35 Hen. 8 c. 5 which give power to the devisor to make devises at his free will and pleasure for the advancement of his wife, &c., or otherwise, &c.[1] Also, to prove this by a case in Littleton [§ 125], that the executors of the devisor of land devisable by custom shall sell the land, they do it not, the heir enters, &c. Also, such devises of land in use have been common. And see a condition, that the devisee shall pay rent to the wife of the devisor and a clause of distress to the wife for the same;

[1] Note how differently this free will and pleasure phrase is construed in Soulle v. Gerrard, post 226.

whether this destroys the condition, *quaere bene*, H. 18 Eliz. [Dyer 348a] Also, note for whose benefit and advantage this condition was made, and by whom it ought to be performed. Also, whether the condition knit to the particular estate only be destroyed and made void by the limitation over in tail, the fee-simple remaining in the devisor, or not? And it seems not, although the remainder had been over in fee; for there is a difference between the reservation of a rent and of a condition; for the one, viz. the latter, may be without deed by livery accordingly, and the former not without deed indented, &c.; and although the remainder be not entailed upon the condition also, yet it takes effect upon this conditional livery; and see Perkins accordant thereto, the last chapter of his book [§ 831], who makes no question of the condition, but whether he in remainder shall take advantage of the breach of it; and it seems not, &c. See also, Fitz. Nat. Brev. in *ex gravi querela* [201 C] such a devise upon condition, &c., remainder over in tail without condition, and good. And if a man make a lease for life reserving a rent and re-entry for default of payment, remainder over in tail; this remainder does not destroy the condition, because it is made all at one and the same time. But when the condition is once annexed to the particular estate, and then by another deed the reversion is granted by the maker of the condition, there the condition is gone, *causa patet*. Also, whether the entry of the heir of the devisor for breach of the condition be lawful, or not? And what estate he shall be adjudged to have? And whether the remainder be defeated, or not? And it seems the entry is lawful, although no re-entry or entry are expressly reserved to him,[2] because it is tacitly implied in law when the condition is to be performed by the devisee. [*127 b] And this sort of condition carries with it a penalty, viz., the defeasance of the estate to which it is annexed. And in common reason he who was prejudiced by the devise, viz., the heir who is disinherited by it, shall take advantage of the breach of the condition. For by Glanvil lib. 7, c. 1, fol. 44 the father cannot make a devise of land without the assent of the heir, but with his assent he may.[3] And it seems that the remainder is not destroyed by the entry, but the heir shall have only an estate for the life of the wife; for there is a difference between this remainder made by will and a remainder created by deed and livery; for in the last case the entry defeats the livery, but it is not so in a will; for a remainder by will, is

[2] If it is a condition, clearly the right of entry for breach exists as a natural consequence, without express reservation.

[3] While Glanvil does make this statement, we hear little of it after him; and certainly it could not hold after the statute of wills expressly permitted the devisor to dispose at his free will and pleasure.

[4] Observe that the future estate here is called a remainder; the name executory devise is a later invention. Observe that the doctrine, that future estates by will are liable to the rules as to remainders by deed if by possibility they could take effect as strict remainders, was as yet unknown. This rule is believed to have arisen from a desire to limit the scope of the rule in Pells v. Brown (1620), post 242.

good although the particular estate were never good;[4] as if to a monk, &c. And the law in this case shall be taken in the same manner as if the devisor had expressly reserved an entry and retainer during the life of the wife; and such tempering and qualifying of the penalty shall not altogether defeat the estate, &c., as Littleton [§ 327] says of re-entry and retainer until, &c. * * * Also the case in 29 assize [159 pl. 17] of a devise to Clerk to be priest, remainder to a commonalty in fee, &c., and he in remainder shall not take advantage of the breach, because no words of the will give it to him, and also he is a stranger to it; but if the words had been *provided that if the condition be broken, his estate shall cease, and he in remainder may immediately enter;* there he should take advantage, although he be a stranger, because the estate determines there without re-entry. And therefore, if I make such a conditional lease for life, with condition, viz. *that the estate shall* cease, and then alien the reversion, the alienee shall take advantage of this condition, because the estate determines without entry, &c. * * *

VAN RENSSELAER v. BALL, New York Ct. of Appeals, March, 1859.—19 N. Y. 100.

Ejectment for 120½ acres of land. Plaintiff gave in evidence an indenture dated Oct. 20, 1792, by which Stephen Van Rensselaer conveyed the land in question to William Ball in fee, reserving an annual rent payable in wheat, fowls, and a day's service each year. The deed contained a covenant by the grantee for himself, his heirs, representatives, and assigns to pay the rent and contained clauses for distress, and for re-entry on condition if the rent should not be paid. It was proved that W. Ball died 12 years before the trial, that defendant his son was in possession, and had paid the rent for his father but not since his death. It was also proved that S. Van Rensselaer died Jan. 26, 1839, leaving a will by which he devised to the plaintiff "all his estate, lands, tenements, rents, and hereditaments, in the manor of Rensselaerwick, on the west side of the Hudson river" including the lands here in question. The defendant objected that the indenture did not create the relation of landlord and tenant between the parties to it or their representatives; that ejectment did not lie except between landlord and tenant; that the reservation called rent was not such in law, but a personal contract between the original parties, affecting only themselves and their representatives, and did not attach to or concern the land; that if this were not so, the plaintiff as devisee of the rent could not enter or maintain ejectment; and that even if he could do that, he must make strict demand of the rent before suing, and must show that there was no sufficient distress on the premises. The judge overruled the several objections, gave judgment for the plaintiff; and defendant's counsel excepted, appealed to the general term, and now ap-

peals from the judgment of the general term affirming the judgment below.

[*102.] DENIO, J.: A condition annexed to a conveyance in fee, that the grantee his heirs and assigns shall pay to the grantor and his heirs an annual rent and that in default of payment the grantor or his heirs may re-enter, is a lawful condition. Littleton puts it as an example of a condition in deed, at the commencement of that part of his treatise which relates to estates upon condition. Such an estate, he says, "is as if a man by deed indented enfeoffs another in fee simple, reserving to him and his heirs yearly a certain rent payable at one feast or divers feasts, per annum on condition that if the rent be behind, &c., that it shall be lawful for the feoffor and his heirs to enter. &c., and if it happen the rent to be behind by a week after any day of payment of it, or by a month after any day of payment of it, or by a half a year, &c., that then it shall be lawful for the feoffor or his heirs to enter," &c. In these cases, if the rent be not paid at such time, or before such time limited and specified within the condition comprised in the indenture, then may the feoffor or his heirs enter into such lands or tenements, and then of his former estate to have and hold, and the feoffee quite to oust thereof. And it is called an estate upon condition, because that the estate of the feoffee is defeasible, if the condition be not performed, &c. (§ 325.) The systematic writers upon the law of real property from that time to the present have assumed the legality of such conditions; and the substance of the condition in the conveyance under consideration is usually put as an example. 2 Bl. Com. 154; 2 Cruise's Dig. c. 1 § 1 pl. 3, 9; 4 Kent Com. 123. Among the numerous authorities referred to by the defendant's counsel, I have been unable to find a single dictum or the slightest hint that such conditions were contrary to law, or that they could only be attached to estates for life or years, or that a common law tenure between the parties, or a reversion in the grantors, were necessary to uphold them. There is moreover, nothing in the case of *De Peyster* v. *Michael,* 2 Seld [467] lately decided in this court, which, properly understood, creates a doubt as to the validity of such a condition, or the lawfulness of annexing one to an estate in fee. [*103].

The books which treat of such estates do, indeed, state that a condition repugnant to the nature of the estate granted is void; and the instances given are of feoffments, or conveyances in fee, by bargain and sale, with a condition that the feoffee or grantee shall not alien; and they say that even this could be done before the statute of *quia emptores* because the feoffor had a possibility of reverter, by the expiration of the feudal investiture upon the failure of heirs of the tenant. Coke Lit. *223a. The argument in the opinion of the chief judge in *De Peyster* v. *Michael* consisted in showing that a condition for the payment of one quarter part of the value of the land and improvements upon each sale by the grantee, or those who should succeed to his estate, was a restraint upon alienation repugnant to the nature of a fee

simple, within the sense of the authorities; and that, although this could be done where there was a reversion, as upon the grant of an estate for life or years, or a possibility of reverter, as upon a feoffment before the statute of *quia emptores,* it was unlawful in this state, in respect to a conveyance in fee, after the re-enactment of that statute by the legislature. It seems to me, that there is nothing in the reasoning of that opinion to encourage one to question the validity of the clauses of re-entry for non-payment of rent in a conveyance in fee, even though the chief judge had not taken care to state, as he has done, that the principles which he laid down would leave to the grantee in these conveyances, and his representatives, the full benefit of the remedy of re-entry for the enforcement of their right to the rent.

But assuming that the estate conveyed to William Ball was defeasible by the non-performance of the condition to pay the annual rent; no one but the grantor or his heirs could, at common law, enter for the breach of a condition subsequent. Littleton 347; Coke Lit. *214b; 4 Kent Com. 127; *Nicoll* v. *N. Y. & E. R. R.,* 12 N. Y. 121. This was the consequence of a maxim of the common law that nothing in action, entry or re-entry, could be granted over; for, as Coke says: "Under color thereof pretended titles might be granted to great men, whereby right might be trodden [*104] down and the weak oppressed, which the common law forbiddeth, as men to grant before they be in possession." Coke Lit. *Supra.* The reason upon which this maxim was founded has, no doubt, become in great measure obsolete; still, the principle that the right of entry cannot in general be granted over is, I am inclined to believe, still a part of the law, notwithstanding the tendency of modern decisions and the provisions of the code. This then is the first difficulty in the plaintiff's case. He brings this action as the assignee, by devise, of the grantor, and not as his heir; and he is disabled from maintaining the action unless the act of 1805 and its different re-enactments apply to the case. Laws 1805, c. 98; 1 R. L. 1813, 364 § 3; 1 R. S.. 748 § 25. I have elsewhere stated the origin and history of the series of enactments in favor of the assignees of reversions, of which this forms a supplement, and have shown that it enabled the grantees of a perpetual rent charge to maintain an action on the covenants for the payment of rent. But the original statute of 32 Henry VIII, c. 34, gives to the assignee mentioned in it not only a remedy by action, but the "like advantages" "by entry for non-payment of the rent" which the grantors might have had, and this feature is preserved in the re-enactments in this state (2 Jones & Var. 184; 1 R. L. 1813, 363, § 1; in the Revised Statutes of 1830 the expression is that the assignees "shall have the same remedy by entry action or otherwise," as their grantor or lessor had or might have had. 1 R. S. 747 § 23. Then follows the provision first introduced by the act of 1805, and continued in the revisions, that this provision shall extend to grants or leases in fee reserving rents, as well as to leases for life or years. But

in all the acts the expression is retained, which is found in the statute of Henry VIII, "as if the reversion had remained in the lessor or grantor." In grants in fee, there being no reversion, these words are inapplicable, or at least incongruous: and to make the provision coherent they should be read as though the language were, "as if said right of entry had remained in the lessor or grantor;" or this particular expression in the statutes [*105] should be limited to the case embraced in the provision where the grantor had a reversion, and be dropped in the cases it is made to relate to grants in fee, upon the rule of construction *redendo singula singulis*. No one can for a moment doubt the intention of the legislature to confer upon the assignees of a grantor in fee reserving rent, the remedy by entry for the non-payment of such rent, precisely as the grantor himself had it before he parted with the right. In other words, the design is plain to make the right of entry transferable, and thus to change to this extent, in favor of this class of conditions, the rule of the common law. This is so manifest to my mind from the reading of the statutes that anything I could further say would be likely to obscure rather than to elucidate it.

There is the question, in the next place, whether where one has a perpetual rent and a right of entry on the land of another to enforce its payment, transmissible to his heirs, but not legally transferable by sale or assignment, the legislature can lawfully interpose, by an enactment declaring that thenceforward the rent and the right of entry shall be subject to transfer like a rent incident to a reversion; in other words, whether the act of 1805 can be applied to conveyances and reservations of rent existing when it was passed, without violating the provision of the constitution of the United States, which protects contracts from being impaired by the state legislatures. I think the statute is not subject to question on that ground. A conveyance, I agree, is as fully within the constitutional provision as an executory contract; and the only point is whether the obligations of the contract contained in this conveyance have been impaired within the sense of the provision. Clearly the rights of Van Rensselaer, the grantor, have not been affected unfavorably. They have been manifestly advanced; for the rent and the remedy to enforce it, have been improved by having imparted to it a vendible quality. Nor have the obligations of the grantee, or his representatives or assigns, been increased, or their remedies changed to their prejudice. The estate of the grantee was subject to be destroyed by a re-entry for non-payment (*106) of rent before the statute, and no new or further liability is attached to it now. A re-entry can be sustained in precisely the same cases in which it could before, and in no others. The contract in question is affected in precisely the same manner as all existing non-negotiable choses in action were by the code of procedure, when it rendered them capable of assignment so as to vest the legal title and the right to sue upon them in the assignee. § 111. Yet the courts have uniformly applied this provision of the code to all existing contracts, equally with those made

after the code was enacted. As to the remedies of the grantee and his representatives and privies in estate, if they have been changed at all, it is to give them a right of action where none existed before. The act of Henry VIII, which has been regularly followed in this particular in our re-enactment, and in the revision, gave a reciprocal remedy to the grantee or lessee, and his representatives, against the assignee of the reversion; and, by the act of 1805, bringing grants in fee within the purview of these provisions, the grantees acquired a remedy against the assignees of the grantor, which they did not possess before. They can now sue such assignees for any breach of the grantor's covenants, which they probably could not have done at common law, and certainly not by any of the statutes prior to the act of 1805; and they are not deprived of any remedy which they might have had against the grantor himself, and his personal representatives, upon his express covenants.

It is, moreover, argued on behalf of the defendant, that if all other difficulties were removed, an action in the nature of ejectment could not be maintained without strict demand of the rent on the land and at the precise time at which it became payable—a formality which it is admitted has not taken place. The common law requires such a demand preparatory to bringing ejectment. (Coke Lit. *201b, 202a.); and it was for the purpose of avoiding "the many niceties which attend re-entries at common law," as it is expressed in the preamble, that the statute 4 Geo. II, c. 28, was passed. It is limited to cases between landlord and tenant where there is a right by [*107] law in the former to re-enter; and it makes the service of a declaration in ejectment to stand in the place and stead of a demand and re-entry. The provision was early re-enacted in this country, and has been continued in each subsequent revision of the laws. 2 Jones & Var. 238, § 23; 1 K. & R. 134, § 23; 1 R. L., 1813, 440 § 23; 2 R. S. 505 § 30. The statutes require, to warrant the action, evidence that no sufficient distress can be found on the premises to satisfy the rent due. The defendant's position is that these acts do not apply to the case, because, as it is argued, a reservation of an annual payment upon a conveyance in fee is not properly rent, as no distress can of common right be made for it, and it is only distrainable by virtue of an express provision contained in the indenture; and the statute requires it to be a case between landlord and tenant, which implies, it is said, that the relation should exist at common law. But such reservations as the one before us were considered as creating a rent within the legal meaning of that term, from the time of Littleton to the present. We have seen that it was called rent in § 325 of the treatise already quoted; and by looking into § 217 and § 218, we see that it was one of the recognized species of rent, and was called rent charge. It was rent, too, as has been shown, for the non-payment of which a re-entry was given at common law, where the right to re-enter was provided for in the deed. The act of 1805 assumes that rent may be reserved upon a conveyance in fee, and the preamble of that act states that such reservations had been, long in use in this state. Now

the inconvenience which the statutes making a declaration in ejectment stand in the place of a strict demand were intended to remedy, was the great particularity and nicety attending this demand at common law; and this was precisely as applicable to rents arising upon grants in fee as upon leases for life or years. I do not, therefore, see any reason, in the nature of the case, or in the language of the statutes, for confining this remedy by ejectment to cases of rent service; and I am of opinion that it is applicable to all cases of non-payment of rent where there was a right to re-enter at common law. * * *

These reasons have led me to the conclusion that none of the points so ingeniously taken and ably urged on the part of the defendant can be sustained; and I am in favor of affirming the judgment of the supreme court.

ALLEN and SHELDON, JJ., took no part in the decision, all the other judges concurring. Judgment affirmed.

Division and Waiver of Conditions.

ANONYMOUS, Easter, 20 Eliz.—A. D. 1578.—Moor 113.

A man seised of copyhold held of a manor, part borough English and part at common law, leased the land by deed indented for 21 years by license of the lord, provided always that if the lessor, his wife, heirs, assigns, or any of them, give a year's warning to the lessee that the husband, wife, or heirs will dwell there, that then the lease shall be void, except that the lessor or his heirs shall pay to the lessee 20£. The lessor and his wife died, and the reversion of the one part descended to the oldest son, and the reversion of the other part descended to the youngest, and he purchased the reversion of his older brother; and later, claiming to be a person within the proviso, gave notice to the lessee. On this two questions were moved: 1, if he was such a person as might give the warning or if the condition is destroyed, the reversion having been severed; 2, if by the words, *except the lessor or his heirs shall pay,* &c., the intent was that this should be a consideration to the lessee for his departure, if these words were sufficient to give the lessee the 20£. MOUNSON and MANWOOD [JJ.] held that he might give the warning, and that the law which had severed the reversion had severed also the condition, although at the commencement they were entire. And so of one part as heir and of the other as assignee of the older brother he might have advantage of the condition. But MANWOOD, J., said that if he had made feoffment of the borough English lands, and had issue two sons and died, now the elder only might have advantage of the condition, for that is a condition in gross, but in this case it was a reversion reserved to the lessor. But if two joint tenants with warranty make partition, or if one grant his part to another, now the warranty is gone; for this is their own act, and they were not compellable

to make partition. And so there was a diversity taken. And as to the other question they held that the words were sufficient to give him the 20£. * * *

HARVY v. OSWOLD, in B. R. Trinity, 38 Eliz.—A. D. 1596.—Moor 456.

In *ejectione firmae* the case was that one made a lease rendering rent, with condition that the lessee should not lease without assent of the lessor. He leased part, and the lessor without notice of it accepted the entire rent of the first lessee; and now the question was if he might enter by the condition. And it was adjudged that he might notwithstanding the acceptance, because he had no notice of the breach, which want of notice the defendant had pleaded in his rejoinder; but if he had notice the acceptance seems a bar, though the condition was collateral. Per GAWDY and POPHAM.

DUMPOR'S CASE, in King's Bench, Hilary Term 45 Eliz.—A. D. 1603.—4 Coke, 119b, 1 Smith Lead. Cas. *85.

"The profession have always wondered at Dumpor's Case, but it has been law so many centuries that we cannot now reverse it." Per Mansfield. C. J., in Doe v. Bliss, 4 Taunton 736.

In trespass between Dumpor and Symms, upon the general issue, the jurors gave a special verdict to this effect: the president and scholars of the college of the Corpus Christi in Oxford, made a lease for years *in anno* 10 Eliz., of the land now in question, to one Bolde, proviso that the lessee or his assigns should not alien the premises to any person or persons without the special license of the lessors. And afterwards the lessors by their deed, *anno* 13 Eliz. licensed the lessee to alien, or demise the land, or any part of it, to any person or persons *quibuscumque*. And afterwards *anno* 15 Eliz. the lessee assigned the term to one Tubbe, who by his last will devised it to his son, and by the same will made his son executor, and died. The son entered generally, and the testator was not indebted to any person, and afterwards the son died intestate, and the ordinary committed administration to one who assigned the term to the defendant. The president and scholars by warrant of attorney entered for the condition broken, and made a lease to the plaintiff for 21 years, who entered on the defendant, who re-entered, upon which re-entry this action of trespass was brought; and that upon the lease made to Bolde the yearly rent of 33*s*. 4*d*. was reserved, and upon the lease to the plaintiff, the yearly rent of 22*s*. was only reserved. And the jurors prayed upon all this matter the advice and discretion of the court, and upon this verdict judgment was given against the plaintiff. And in this case divers points were debated and resolved: 1. That the alienation by license to Tubbe, had determined the condition, so that no alienation which he might afterwards make could break the proviso or give cause of entry to the lessors, for the lessors could not dispense with an alienation for one

time and that the same estate should remain subject to the proviso after. And although the proviso be, that the lessee or his assigns should not alien, yet when the lessors license the lessee to alien, they shall never defeat, by force of the said proviso, the term which is absolutely aliened by their license, in as much as the assignee has the same term which was assigned with their assent: so if the lessors dispense with one alienation they thereby dispense with all alienations after; for inasmuch as by force of the lessor's license and of the lessee's assignment, the estate and interest of Tubbe was absolute it was not possible that his assignee who has his estate and interest shall be subject to the first condition: and as the dispensation of one alienation is the dispensation of all others, so it is as to the persons, for if the lessors dispense with one, all the others are at liberty. And therefore it was adjudged, Trinity 28 Eliz., Rot. 256, in the common pleas between *Leeds and Crompton* (Cro. Eliz. 816, Godb. 93, Noy 32, 4 Leon. 58, 2 Bulstr. 291) that where the Lord Stratford made a lease to three, upon condition that they or any of them should not alien without the assent of the lessor, and afterwards one aliened by his assent, and afterwards the other two aliened without license, and it was adjudged that in this case the condition being determined as to one person, by the license of the lessor was determined in all. And POPHAM, C. J., denied the case in 16 Eliz., Dyer 334, that if a man lease land upon condition that he shall not alien the land or any part of it without the assent of the lessor, and afterwards he aliens part with the assent of the lessor, that he cannot alien the residue without the assent of the lessor: and conceived that is not law, for he said the condition could not be divided or apportioned by the act of the parties; and in the same case as to parcel which was aliened by the assent of the lessor the condition is determined; for although the lessee alien any part of the residue, the lessor shall not enter into the part aliened by the license, and therefore the condition being determined in part is determined in all. And therefore the chief justice said he thought the said case was falsely printed, for he held clearly that it was not law.

NOTE reader, Paschae 14 Eliz. Rot. 1015, in the common pleas, that where the lease was made by deed indented for 21 years of three manors, A, B, C. rendering rent, for A 6*l.* for B 5*l*, for C 10*l.*, to be paid in a place out of the land, with a condition of re-entry into all three manors for default of payment of the said rents, or any of them, and afterwards the lessor by deed indented and enrolled bargained and sold the reversion of one house and 40 acres of land parcel of the manor of A to one and his heirs, and afterwards by another deed indented and enrolled bargained and sold all the residue to another and his heirs; and if the second bargainee should enter for condition broken or not was the question. And it was adjudged that he should not enter for the condition broken; because the condition being entire, could not be apportioned by the act of the parties, but by the severance of a part of the reversion is destroyed in all. But it was agreed that

a condition may be apportioned in two cases: 1, By act in law; 2, By act and wrong of the lessee. By act in law, as if a man seised of two acres, the one in fee, and the other in borough English, has issue two sons and leases both acres for life or years rendering rent, with condition, the lessor dies; in this case by this descent, which is an act in law, the reversion, rent, and condition are divided. By act and wrong of the lessee, as if the lessee makes a feoffment of part or commits waste in part, and the lessor enters for the forfeiture or recovers the place wasted, there the rent and condition shall be apportioned; for none shall take advantage of his own wrong, and the lessor shall not be prejudiced by the wrong of the lessee. And the Lord Dyer, then chief justice of the common pleas, in the same case said, that he who enters for a condition broken ought to be in of the same estate which he had at the time of the condition created, and *that* he cannot have when he has departed with the reversion of part; and with that reason agrees Littleton 80b. And *vide* 4 & 5 Phil. & Mary, Dyer 152 pl. 7, where a proviso in an indenture of lease was that the lessee his executors or assigns should not alien to any person without license of the lessor but only to one of the sons of the lessee; the lessee died, his executor assigned it over to one of his sons; it was held by Stamford and Catlin [JJ.] that the son might alien to whom he pleased without license, for the condition as to the son was determined, which agrees with the resolution of the principal point in the case at bar. 2. it was resolved that the statutes of 13 Eliz. c. 10; and 18 Eliz c. 11, concerning leases made by deans and chapters, colleges and other ecclesiastical persons, are general laws whereof the court ought to take knowledge though they are not found by the jurors, and so it was resolved between *Claypool and Carter* [Yelv. 106, 1 Leon. 306, Moor 593] in a writ of error in the king's bench.

Conditions in Restraint of Alienation.

LITTLETON'S TENURES, §§ 360-363. Littleton died in A. D. 1482.

§360. Also if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is enfeoffed of lands or tenements, he hath power by law to alien them to any person: for if such a condition should be good then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore such a condition is void.

"And the like law is of a devise in fee upon condition that the devisee shall not alien, the condition is void, and so it is of a grant, release, confirmation, or any other conveyance whereby a fee simple doth pass; for it is absurd and repugnant to reason that he that hath no possibility to have the land revert to him, should restrain his feoffee in fee simple of all his power to alien. And so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel, real or personal, and give or sell his whole interest or property therein upon condition that the donee or vendee shall not alien the same, the same is void because his whole interest and property is out of him, so as he hath no possibility of a reverter." Coke Lit. 223a (A. D. 1620-30).

§361. But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one, &c., or the like, which conditions do not take away all power of alienation from the feoffee, &c., then such condition is good.

§362. Also, if lands be given in tail on condition that the tenant in tail nor his heirs shall not alien in fee nor in tail nor for the term of another's life, but only for their own lives, &c., such condition is good; and the reason is that when he makes such alienation and discontinuance of the entail he does contrary to the intent of the donor for which the statute of Westminster 2d, c. 1, was made, by which statute the estates in tail were ordained.

"If a feoffment be made upon condition that the feoffee shall not alien in mortmain, this is good because such alienation is prohibited by law; and regularly whatsoever is prohibited by law may be prohibited by condition, be it *malum prohibitum* or *malum in se*." Coke Lit. 223b.

"And yet if a man make a gift in tail upon condition that he shall not make a lease for his own life, albeit the state be lawful, yet the condition is good, because the reverson is in the donor; as if a man make a lease for life or years upon condition that they shall not grant over their estate or let the land to others, this is good, and yet the grant or lease should be lawful. * * * If a gift in tail be made upon condition that the donee shall not alien; this condition is good to some intents and void to some; for as to all those alienations which amount to any discontinuance of the state tail (as Littleton here speaketh) or is against the statute of Westminster 2d, the condition is good without question; but as to a common recovery the condition is void, because this is no discontinuance but a bar, and this common recovery is not restrained by the said statute." Coke Lit. 223b.

§363. For it is proved by the words comprised in the same statute that the will of the donor in such cases shall be observed, and when the tenant in tail makes such discontinuance he does contrary to that, &c. And also in estates in tail of any tenements when the reversion of the fee simple or the remainder of the fee simple is in other persons when such discontinuance is made, then the fee simple in the remainder is discontinued; and because the tenant in tail shall do no such thing, against the profit of his issues and good right, such condition is good, as is aforesaid.

§720. I have heard say that in the time of King Richard II there was a judge of the common pleas dwelling in Kent called Richel, who had issue divers sons, and his intent was that his eldest son should have certain lands and tenements to him and to the heirs of his body begotten, and for default of issue the remainder to the second son, &c., and so to the third son, &c.; and because he would that none of his sons should alien or make warranty to bar or hurt the others that should be in remainder, &c., he caused an indenture to be made to this effect, viz. that the lands and tenements were given to his eldest son upon such condition that if the eldest son alien in fee or in fee tail, &c., or if any of his sons alien &c., that then their estate should cease and be void, and that then the same lands and tenements immediately should remain to the second son and to the heirs of his body begotten,

and so to the last, the remainder to his other sons, and livery of seisin was made accordingly.

721. But it seems by reason, that all such remainders in the form aforesaid are void and of no value, and this for three causes: One cause is that every remainder that begins by deed ought to be in him to whom the remainder is entailed by force of the same deed before the livery of seisin is made to him who shall have the freehold; for in such case the growing and being of the remainder is by the livery of seisin to him that shall have the freehold, and such remainder was not to the second son at the time of the livery of seisin in the case aforesaid, &c.

722. The second cause is, if the first son alien the tenements in fee, then is the freehold and the fee simple in the alienee and in none other; and if the donor had any reversion, by such alienation the reversion is discontinued; then how in reason can it be that such remainder shall commence its being and its growing immediately after such alienation made to a stranger who has by the same alienation a freehold and fee simple, &c.? And also, if such remainder should be good then might he enter upon the alienee where he had no manner of right before the alienation, which should be inconvenient.

723. The third cause is, when the condition is such, that if the elder son alien, &c. that his estate shall cease and be void, &c., then after such alienation, &c., may the donor enter by force of such condition, as it seems; and so the donor or his heirs in such case ought sooner to have the land than the second son that had not any right before such alienation; and so it seems that such remainders in the case aforesaid are void.

Note that Richel's settlement was long before common recoveries were invented, and that Littleton wrote about the time of the decision of Taltarium's Case, *ante*.

ANON., in Assize, 33 Edw. III, A. D. 1360—Liber Assize 33, pl. 11, p. 201.

It was found by verdict of the assize that one J was seized of certain lands and gave the same to one R and Alice his wife, to them and the heirs of their two bodies begotten, on condition that if the tenant or his heirs alien, the donor and his heirs may enter; the tenants in tail entered and aliened to a stranger, who aliened over to a man and to his wife and the heirs of the man, the man died leaving issue two sons; the first donor had issue and died, the issue of the first donor within age entered on the wife and leased the land to the wife for term of her life, and then the wife died and he in reversion entered and leased to the son of the man and his wife to hold at will, and the issue of the man and wife died and the issue of the donor entered, and the issue of the brother of the tenant at will entered, on whom the issue of the donor brought assize.

Hill for the tenant said: Since it is found that the first feoffee was in by title and the second also, and died seized, and that his issue came to

the tenancy, which can only be considered as by descent of the inheritance, to which his brother had title, therefore we demand judgment that he is barred.

Finch for the plaintiff: There is nothing to determine but whether the condition on which the first gift was dependent may be maintained by the law. I believe by the law the entry of the donor or his issue is given against any person; for he who would receive the estate of the donor may restrict his estate as to those who are parties to the condition, for between the donor and his heirs the tenant is subject to the condition. For if I enfeoff a man in fee, reserving to me a rent and for default of payment an entry, he who has the fee by his deed has restricted his estate so that all is dependent on the condition; and at any hour that the condition is broken, entry by those who were parties to the condition is maintainable. Wherefore it seems that as to this point the entry is maintainable; and as to the other point, the entry on each person is maintainable if he is not restrained by warranty. And where there are two claims the better reason is to save the older right than it would be to save the warranty of the junior if they cannot both be saved by law. But now in this case if the entry of the donor and his heirs is not maintainable the right is lost forever, for no other recovery is given by the law; for a writ of right he cannot have, because he will not be able to join at all in the mise on the better right of this possession. Wherefore it seems that there is greater reason to save the older right than there is to save the warranty of the junior.

MOUBRAY [J.]. I say that in this case he may have a writ *ad terminum que præteriit*, and also where one aliens in fee on condition. (Which was denied by CHELRE [J.]. Quaere.)

Finch: I say that a party can have no advantage of a condition found by the assize where the same party may not have pleaded in bar. But in the case here the party would not be received to plead the condition if he had not had the condition before, and only where entry is reserved. Therefore it seems in this case he will get no advantage of the verdict. For if a man enfeoff me rendering rent, reserving to himself an entry for default of payment of the rent, and the rent be arrear, if he die and his issue enter, or if he alien, unquestionably the estate of the tenant is defeasible. And again it is no answer at all to those who were parties to the condition for the others that they were not parties to the indenture which shows the condition; wherefore it seems so in this case.

CL. [J.?]: If I lease to a man for term of years and deliver him seizin by deed, on condition that if he be ousted he shall have the fee, I say that on the livery of seizin and the condition his estate is dependent. So say I in this case. THORP, [Chief] Justice, said that in this case the issue of the donee should have a writ of formedon. GREEN, Justice: If I alien to a man in fee on condition that if he or his heirs make assignment, I or my heirs may enter, though he make assignment I may not enter; for it is contrary to law that he should have a fee by my feoffment to him and his heirs and that he may not make any demise. So here. And there it was said that after the term ended by the death of the lessee who held for term of years, I should have *ad terminum qui præteriit* if a stranger enter, but in this case never may another who may enter recover. Wherefore, by the opinion of SKIPWITH, Justice, and of all the others, the entry was maintainable; and also he said that unquestionably before entry the tenant would have the

fee; so that this writ *ad terminum qui præteriit* does not lie. And adjourned to xv Hilary.

ANON., in Hilary Term 21 Hen. VI, 33, pl. 21.—A. D. 1443.

Note that a question was moved between the justices (NEWTON absent), as to this: A lease was made for a term of years on condition that the lessee should not grant over his estate, and whether this condition was void or not was the question. PASTON: The condition seems clearly void; for in that the lease is made is included that the lessee may grant over his estate. For, suppose that a feoffment is made in fee simple on condition that the lessee shall not make waste: the condition is void, for what is in him includes that he may commit waste; so it is repugnant to the estate granted. YELVERTON: In your case, where a feoffment is made in fee on condition that he may not commit waste, or that he may not alien, I will grant that the condition is void, because at the time of the feoffment the fee and right passes out of the person of the feoffor, and so that he had no right reserved in him; and so the condition reserved to him is void. But in the case that is here moved, the freehold and the fee did not pass out of the person of the lessor; so that he may well reserve this condition. PASTON: Suppose that the lease was made for term of life on condition that he may not commit waste, I contend that this condition is void; and yet a reversion in fee simple remains in the person of the lessor: and I claim that in such a case the condition is void, not for the damages that may result, but for the inconvenience. FULTHORP (J.): Suppose that one gives land in tail on condition that the donee in tail shall not discontinue the estate tail, is this condition void? I hold that it is not; for Thirning, who was chief justice here, gave his land to his eldest son on condition that if he alien, &c. it should remain to his younger son, and so he made the remainder to two or three others. ASCUE (J.): I understand that such a gift in tail with the condition is good and effectual, for Thirning made this gift on the advice of the justices of his time. PASTON: Not exactly; I know it was done with the assent of the justices, and he said he would have the gift openly stated in the court, and Hankey said it would be valid.

And he laughed and said that the whole condition was void; and so it seems to me. And note that in [Liber] Assize 24 plea 8[1] was found another gift in tail on the condition recited by Filthorp and Ascue, and the condition was held good by the whole court; but of a fee simple it was said the contrary was the law. And note that it was after averment. And note also that another gift in tail was made on great deliberation on the conclusion of accord between Lord FitzHugh and Lord Lescrop. See 13 Henry IV, in a writ of *ejectione firmæ,* which agrees with what Paston said.

[1]There are only seven cases in the printed book of that year.

ANON., in Mich. Term.—A. D. 1495.—Yearbooks, Mich. Term, 10 Hen. VII 11, pl. 28.

Land was given in tail, remainder in fee, on condition that if the donee in tail or his heirs alien, to the damage of the issue, the donor and his heirs might enter: and the opinion of the court was that the condition was good, and one may make a condition on any act prohibited by law. For I may lease my land to one for term of life proviso that he shall not alien in fee, or proviso that he shall not commit waste; and I may make feoffment proviso that the feoffee shall not commit felony, or that he shall not alien in mortmain or within age. And also, I may enfeoff one and his wife on condition that they shall not enfeoff any man by deed; but I may not enfeoff them on condition that they shall not levy a fine, for this [condition] is merely contrary to their estate. Yet I may restrain the feoffee by condition in deed that he shall not do an unlawful act.

KEBLE held that if I infeoff a man in fee, omitting the word *assigns,* provided that he shall not alien, the condition is good, for the condition is consistent with the estate; for it is given to him and his heirs, the nature of which gift is not to have perpetual continuance, &c. Which the majority denied.

ANON., in Common Bench.—A. D. 1496.—Yearbooks, Mich. Term, 11 Hen. VII, 6, pl. 25.

Note that it was held by all the justices of the common bench, trinity term 8 Hen. VII, that if land is given in tail, remainder over to the right heirs of the tenant in tail, on condition that if he or his heirs should alien in fee the donor or his heirs might enter, this is a good condition notwithstanding the fee simple in reversion; and the diversity was taken between a fee simple in possession and a fee simple depending on another estate. And it was well argued.

ANON., in Common Pleas? of England, Easter term, A. D. 1498—13 Henry VII, 22.

In a formedon in remainder the tenant said that his ancestor whose heir, &c., was seized and gave the manor in tail the remainder to the right heirs of the donee, on condition that if he or any of his heirs of his body should alien in fee or in tail or for term of life, or grant in any manner an estate that they should not have, then the donor and his heirs might enter; and he said that one such issue in tail, being seized by force of the gift, discontinued the manor to a stranger in tail the remainder to the ancestor of the demandant in fee; and because that one discontinued in breach of the condition, he entered as heir, &c., and he demanded judgment if the action; and he showed said deed, proving that if the donee or his heirs of his body, &c., or his right heirs should make alienation as above, the donor or his heirs might enter;

and this deed was entered *in haec verba;* and on this bar the demandant demurred in judgment, and the demurrer was entered Easter last.

Rede. You note that the condition alleged in the bar speaks only of alienation by the donee and the heirs of his body, and the deed extends over to his right heirs; so the bar is not warranted by the deed. Because of this that the first deed extends to his heirs in tail, as is alleged in the bar, and beyond this to his heirs in fee simple, of which nothing is said in the bar, so the bar is well warranted by the deed and more; which is not admitted. Moreover, it seems that the bar is not good, because the condition is repugnant to the estate; for the gift is not merely of an estate tail, but of a fee simple; and in a feoffment in fee simple on condition that he shall not alienate, the condition is void because it is contrary to the estate. Since the condition went in defeasance of all his estate, in which case it should be held void as to the remainder in fee simple; and being void as to part, it is void as to all. And suppose that I make a lease for life on condition that if I grant the reversion the tenant shall have the fee, I say that this condition is void, because by the grant of the reversion a third person has a lawful interest before the condition can have effect. So here, by the grant of the remainder of the fee simple to the same donee, because of the interest he had in the fee simple, the condition annexed to the estate tail may not have effect, because it went in destruction of both. And it is clear that this fee simple may lawfully be sold notwithstanding the condition, because it is contrary to the estate in fee simple; and because the condition is repugnant in part and contrary to law in part, it must be wholly void. Wherefore, &c.

Keble to the contrary: It seems to me that one may condition with a feoffee in fee simple that he shall not alien. (BRIAN [C. J.] interrupted him, and said that they would not hear him argue this conceit, for it was merely against common learning, which is now in a manner a principle; so that by this we would overthrow all our ancient precedents; wherefore he need say no more of that point.) *Keble:* Sir, it seems to me that this condition is good; there are three conditions not allowable, and this is none of the three: first if the condition is impossible, second if repugnant to itself, third if the condition is contrary to law; but the condition here is none of these; and is good according to the estate, for it enforces the very estate. In every case in which the thing to which the condition refers is prohibited by law, I may restrain the person by my condition that he shall not do this thing which is contrary to law. As if I make a feoffment on condition that he shall not discontinue, or that he shall not alien in mortmain, or I enfeoff a man and wife on condition that he shall not discontinue, or to an infant on condition that he shall not alien, or the like. And also in every case in which one may covenant with his feoffee, it would seem that he may condition; as if that he shall pay certain money to the feoffor or to a stranger. And also at the common law one might have made a feoffment to hold of himself, on condition that the feoffee should not alien to any; for by the alienation the lord would be injured, in that by this the tenancy is prolonged and the lord's escheat delayed. And this thing lies well in covenant, and therefore in condition as it seems to me; wherefore it seems to me that the condition is good.

Fisher, to the contrary. It seems to me that the condition is contrary as well to the estate tail as to the estate of fee simple, and both estates absolutely in the same person, for the remainder is wholly in him. And it has been adjudged in such a case that if a writ of right is brought against a tenant in tail who has the remainder in fee, that he may be joined in the mise on the mere right; which proves that he has the fee simple in possession, to which fee simple the condition is merely repugnant; and so void in part, void in all. And so it changes the nature of the case where the donee has the fee simple and where not, for the reason stated; for if

he should reserve the fee simple or grant the remainder over, then would the condition not extend to the fee simple directly but only to the estate tail on which the remainder depends. And also, it seems to me that the condition is contrary to the estate tail; for at the common law the tenant in tail had power to alienate after issue begotten, and was tenant in fee simple; and because such was the common law in this case, I understand that if the donor makes a condition that the donee in tail shall not alienate, the condition is also as contrary to this estate at this time as to an estate in fee simple at this day; wherefore the statute of Westm. 2d has not restrained this power of alienation, for by the alienation the heir is put to his action of formedon given by the statute. So the statute has done nothing but give an action to recover the tail, but the same power of alienation which was at common law remains at this day, and so the condition is as contrary to the one estate as to the other; wherefore, &c.

FINEUX [J.] to the contrary: Whether the remainder was in the donor or in the donee or was granted over does not change the case, for the privity is sufficient cause of entry. For if I make a lease for term of life, the remainder over on condition that if he alien I may re-enter, this condition is good; the same is the law of a condition that he shall not commit waste; and yet in both cases he in remainder would have the land by a condition in law if there were no condition in the deed. But in every case in which the reasonableness of the law speaks of any condition, the feoffor may well speak of this by a condition in deed; for nothing in the world speaks so reasonably as the law speaks. And by this the law in each case makes a condition as available to the feoffor without anything said by the feoffor as if he should plainly express the condition; as if I enfeoff you to re-enfeoff me, and before you re-enfeoff you charge the land, or take a wife, or make feoffment over, in all these cases a regress is open to me by law; and this is often adjudged. (Which KEBLE conceded, but BRIAN [C. J.] would not grant the first two cases, *quære* of these.) So the condition is consistent with the estate. But if the condition is repugnant it is otherwise; as if I give you land in fee simple by the premises of my deed and by the words of the *habendum* only for years or term of life; the *habendum* is void because repugnant to the estate preceding; but if the premises give you an estate for term of life or in tail and the latter clause a fee simple all may be good; and so if the premises give a fee simple and the sequel only an estate tail, for this is not contrary to the premises.

VAVISOUR [J.]: I hold the condition good; and I agree with you that such condition to a tenant in tail at the common law was void, because the issue was not sure to have the land; for by the alienation of the ancestor he was without remedy. So he had power to make a lawful alienation, but now he has not, for the issue may recover the land by action; and so it seems to me that the condition is good in the case here. But such a condition to a donee in tail at common law, and to a feoffee in fee so long as J of S should have issue is void.

TOWNSEND [J.] held the condition good in both cases the last term. *Ideo quære.*

DANVERS [J.] to the contrary: The statement that the condition enforces the tail is not true; but it tends to destroy the estate tail, for

by the re-entry it is entirely destroyed; and so the condition is repugnant. And he denied the cases of condition that the feoffees should not discontinue, commit felony, alien in mortmain, &c., and said that the condition in all these cases was void, for third persons had an interest, viz., the lord by alienation in mortmain, and the lord has a present interest in these cases to have the land. But VAVISOUR [J.] and TOWNSEND [J.] agreed in their argument that the condition in these cases is good.

TOWNSEND [J.]: All are agreed that if the reversion should continue in the donor, then the condition would be good; and I will show that this does not alter the case; for if in the first place he should make the condition on the donee, and later should grant the reversion over on the same condition that if the tenant in tail on which the reversion is dependent make discontinuance of his own estate then it should be lawful for the grantor to enter, it cannot be denied that these conditions in several grants would be good; and so why not both pass at one time? And suppose that I make a lease for life the remainder in tail on condition that if the termor alien I may re-enter, this condition is good; and yet if there were no condition he in remainder in tail might enter because of the alienation; but in such case the feoffor of whom he had the land might have spoken by a condition in deed, and this should be preferred before the condition in law. And as to what Danvers said that the condition operated in destruction of the estate tail, sir, that is not so; for it is a penalty in restraint of alienation of the gift, to the intent that this alienation should not have effect; so it is a pain dependent on the alienation to discourage it and make it not good. And as to what some said, that a collateral warranty made to descend or a lineal warranty with assets descended to the issue, and the like, bars him in formedon; which cases prove in their opinion that the tenant in tail had power to alienate in fee notwithstanding the estate, because the discontinuance in this way ought to be affirmed in law; sir, these prove that the alienations were never lawful deeds; for the feoffment is not enough without this recompense outside; and one may sell a thing which may be lawfully sold, and this may not be by a tenant in tail; wherefore, &c. BRIAN to the same. And the remainder in fee simple depends on the estate tail, which may not by any means be executed before the issue in tail is exhausted.

This case is cited and commented on in Coke Lit. *223b-224a, and contains the most extended argument on conditions in restraint of alienation of the fee to be found in the old books.

ANON., in Common Bench, Mich. 31 Hen. 8.—A. D. 1540.—Dyer 45a.

A lease was made to one for term of years upon condition that the lessee should not alien his term to J. S.; and he aliens to R. B., who aliens to the said J. S. It was moved in C. B., whether the condition be broken? And it should seem not, because every condition is taken strictly; for if a man make a feoffment upon condition that he shall

not enfeoff J. S., and he die, and his heir enfeoff J. S. this is not a breach of the condition. * * *

PARRY v. HARBERT, in Court of Augmentation, Mich. 31 Hen. 8.—A. D. 1540.—Dyer 45b.

A lease was made for a term of years, upon condition, *that if the lessee during his life should assign his term to any other without the assent of the lessor, it should be lawful for the lessor to re-enter.* The lessee devised his term by his will to another without the assent, &c. Whether this was cause of forfeiture? Because during his life the assignment did not take effect. And yet R. BROOKE, and HALES, the master of the rolls, thought this was a forfeiture; for the devisee, when he is in, shall be said to be in by assignment, which the lessor [lessee] made during his life. * * *

ANON., Mich. 3 Edw. 6—A. D. 1550.—Dyer 65b.

A question was asked upon these words in a lease, viz. *and it shall not be lawful for the lessee to give, sell or grant his estate and term to any person without the leave of the lessor, upon pain of forfeiture of his said term.* The lessor and lessee die, and the executors sell the term without the leave of the heir. It was holden, that this is out of the case of forfeiture, because the restraint was only [*66a] during the lives of the lessor and lessee. And yet it was agreed in the bench, that the words above make a condition.

GOSTWICK'S CASE, in Common Pleas.—A. D. 1591.—Cro. Eliz. 163.

A lease was made for two years, upon condition, that they nor either of them shall alien any part of the land without the assent of the lessor. They make partition, and one aliens his part. This is a forfeiture of the whole.

GERMIN v. ASCOT, in Common Bench, Mich. 37 & 38 Eliz.—A. D. 1596.—Abridged from Moor 364, 1 And. 186, 2 and 7.

Waste. Carew, being seised in fee of the land, made a lease for years, and afterwards devised it to his sons in tail male successively, with proviso that if any of the devisees or their issue go about to alien, discontinue, or incumber the premises, then from the time they so go about their estate shall cease as if they were naturally dead, and from thenceforth it shall be lawful for him next in remainder to enter and hold the land for the life of him that shall so alien, and that on his death the land shall go to his issue as if no such offense had been committed. The devisor died. The eldest son and all other except the second levied a fine of the land, for which the second came and claimed by force of the devise. Afterwards the lessee committed waste,

the conusee brought waste, the defendant pleaded all this matter and the plaintiff demurred.

ALL THE JUSTICES agreed that the proviso of cessor on attempt to alien or for alienation was wholly repugnant, and that the remainder to the second son limited to commence on such attempt was void; for which they adjudged against the second son, who brought this action. The justices argued the case openly, and conferred with all the justices of England, who agreed as one that the proviso was repugnant.

SHARINGTON v. MINORS, in Queen's Bench, Hilary term, 38 Eliz., A. D. 1596—Moore 543.

A special verdict in *ejectione firmæ* was this: devise of land to one in tail with other remainders in tail, and with this clause: "My mind is that if any of the said persons afore entailed to my said lands, or their heirs do unlawfully vex, disquiet, or trouble, any other of them for the same; or do mortgage, sell, or pledge, the same or any part thereof, or his interest, possibility or title therein, or any part thereof, or do hurtfully dismember, dissipate, or waste the same, or any part thereof; that then every such person, and his and their heirs shall forthwith be clearly discharged, excluded, and dismissed, as touching the said entail of mine, and the conveyance by words aforegoing of the entail of my said lands to be of no force to him or them, but the same immediately to descend and come to the next party in tail, to him or them, as effectually as if such disordered person had never been minded of in this my will and testament." Scholastica having this land by the forfeiture of the first estate, now she and her husband levied a fine, and he in the next remainder entered. And if this entry was lawful the jurors found for the plaintiff; if not, for the defendant.

The case was often argued; and three of the justices, viz., FENNER, GAWDY, and CLENCH, held that the estate of him in the remainder is subject to the limitation to cease by alienation, and the next in remainder may enter; wherefore they held with the commentaries [*Newis* v. *Lark*, 2 Plowd. Com. 403, *ante* p. —] that the entry of the lessor of the plaintiff was lawful.

POPHAM [C. J.] to the contrary; and he said, that, although it should be a limitation and not a condition, and tho the will is to have a favorable interpretation according to the intent, yet if the limitation should be an act impossible or against law it is void, as *Germain* and *Arscot's* case [*ante p.* —] adjudged in the common pleas, that the proviso that the estate of the one who had entailed should entirely cease in his life is a void limitation because repugnant and impossible. In the case at bar if the estate of the seller should cease as if no such estate had been made (as the words of the will indicate), then he should be a trespasser from the beginning, which is repugnant and impossible, because it should be construed to cease only from the time of the alienation; and if so, then it is to say that it shall not cease till the alienation consummated, and by that time there is a discontinuance of the entail already tho

but for an instant, which discontinuance is to be purged by a formedon by him in remainder by pleading the special matter as if the first tenant were dead without issue, and by this he would avoid the discontinuance and the estate, but his entry is not lawful, and so it now remains.

But afterwards, Easter 41 Eliz., it was adjudged for the plaintiff on the opinion of the three justices against the opinion of POPHAM, chief justice.

CORBET'S CASE, in Common Pleas, Easter, 42 Eliz.—A. D. 1600, 1 Coke 83b, 2 And. 134.—Abridged from Coke.

Christopher Corbet being seised of manor of S, covenanted by indenture with several for himself and his heirs, to stand seised of it for his own use for life, then to the use of his son Roland in tail male, and for want of such issue to use of Christopher's son Arthur in tail male, then to the use of others of his blood in tail, and finally to the use of the right heirs of said Christopher. By the same deed it was covenanted that if anything should be done by Roland or any of his heirs of his body to alienate the manor or bar the entail, that then immediately before such act attempted the use and estate in him limited should cease and the manor should immediately pass to the person next entitled in the same manner as if the person so attempting were naturally dead. Christopher died, and Roland suffered a common recovery to his own use, whereupon Arthur entered, Roland re-entered, and Arthur sued him in trespass. Whether Arthur's entry was lawful was the question.

By ANDERSON, [C. J.] and WALMSLEY, GLANVIL, and KINGMILL, [JJ.], it was resolved that this proviso to cease an estate limited to one and his heirs male of his body as if the tenant in tail was dead, was repugnant, impossible, and against law; for the death of the tenant in tail is not a *cesser* of the estate tail, but the death of the tenant in tail without issue of his body is the determination thereof. And if the estate tail should cease as if he was dead his issue inheritable to the estate in tail would have it by descent in the life of his father, or he in remainder or reversion would have it in the life of the tenant in tail which is not possible; for to every descent, remainder, or reversion, upon the determination of an estate tail, death, either civil as entry into religion, or natural, as dissolution of the soul from the body, is requisite. It was said that there was no such repugnancy or impossibility at the time of the breach in the case at bar, because the tenant in tail had no issue at the time. To that it was answered that the having of issue was not material, that this was repugnant to the beginning: for by the express limitation he has an estate of inheritance, which by possibility may continue forever, and his estate of inheritance does not begin by the having of issue, but presently before any issue he has an estate of inheritance; and therefore before issue

his feoffment is a discontinuance and no forfeiture, neither shall he in reversion be received upon his default in a praecipe.

ANDERSON, C. J., put the case in 8 Assize pl. 33, where a man gave land to Mary and Joan her sister and to the heirs of their bodies begotten, by which they had a joint estate for life and several inheritances; and the donor intending that neither of them should break the jointure, but that the survivor should have all by survivorship, added this clause, that by this provision she who survived would have the land entire; but for as much as his intent is contrary to law, therefore if the jointure be severed by a fine levied, the survivor shall not have the part so severed, by the clause which he hath inserted out of his own conceit and imagination repugnant to law and reason. So here the intent of Christopher was that the estate tail should cease as if the tenant in tail was dead, which intent is repugnant to the rules of law and against sense and reason. And he cited also *Plesington's Case*, 6 Rich. 2, [Fitzherbert's Abr.] tit. *Quid Juris Clamat*, pl. 20, [in which] a man makes a lease on condition that if the lessor grant the reversion the lessee shall have the fee. If the lessor grant the reversion by fine, he shall not have the fee, for the condition is repugnant and void. He also discussed at length two cases adjudged in point on the case at bar, one in the case of a will *Germin* v. *Arscot*, [Moor 364, 4 Leonard 83, 1 Anderson 186,] and the other in the case of a use, *Chomley* v. *Humble*, [1 Anderson 346, Cro. Eliz. 379, *post* —.]

WALMSLEY, J., said that when an estate is given to one it may be defeated wholly by a condition or limitation; but the same estate or any part of it cannot be determined as to one, and given in part or in all to another, for that is repugnant to the rules of law. As if a man makes a lease for life on condition that if he do not pay 20£ that another shall have the land, this future limitation is void. And in the case at the bar the donor might have annexed a condition or limitation to determine his estate; but in this case the donor intended to continue the estate tail, and to cease it as to one, and in his life transfer it to another. It would be strange and against reason that this estate in the case at bar should end in regard to one and continue in regard to another, and that Roland should be dead when one saw him, and be alive when another saw him. An act of parliament or the common law may make an estate void as to one and good as to another but a man by his words and the breath of his mouth cannot do it.

GLANVIL, [J.], said that betwixt the making of the statute *De Donis Conditionalibus*, 13 Edw. 1, c. 1, and the Statute of Uses, 27 Hen. 8. c. 10, such proviso annexed to an estate tail that it should cease as if the tenant in tail was dead was never seen nor heard of; and therefore he concluded that it cannot be done by the law. Uses were not within the letter of the statute De Donis, which speaks only of lands and tenements, but are within the equity, and therefore ought to follow the

nature of the land. Richill, who was a judge in the time of Richard 2, and Thirning, who was chief justice of the common pleas in the time of Henry 4 intended to have made perpetuities, and upon forfeiture of the estate tail of one of their sons to have given the remainder an entry to another, but such remainders were utterly void and against the law.

And for these reasons it was resolved by the whole court without dissent that judgment should be given against the plaintiff.

This is usually cited as the leading case on the questions decided; but why it should be considered so important is not easy to see, when it follows other decisions in the same court so nearly like it on the facts, viz: Germin v. Ascot ante, and Chomley v. Humble, post.

SIR ANTHONY MILDMAY'S CASE, in King's Bench, Mich. term, 3 Jac. I, A. D. 1606—6 Coke 40a.

This term the case on a special verdict in an action of trespass done at Newton in the county of Northampton, between James Hethersall, lessee of Humphrey Mildmay, Esq., plaintiff, against Sir Anthony Mildmay, knight, defendant (which was *mutatis mutandis* all one with *Corbet's Case,* reported by me in the first part of my reports f. 84) [above], was argued at the bar, as it had been in sundry terms past; and was also argued by the judges; and this was adjudged against the plaintiff according to the judgment given in *Corbet's Case.* And in this case some points on great consideration were resolved, which were not moved in *Corbet's Case*:

1. That all these perpetuities were against the reason and policy of the common law; for at common law all inheritances were fee-simple, as *Littleton* saith (Lib. 1, c. Estates-tail, §13); and the reason thereof was, that neither lords should be defeated of their escheats, wards, &c., nor the farmers or purchasers lose their estates or leases, or be evicted by the heirs of the grantors or lessors nor such infinite occasions of troubles, contentions, and suits arise. But the true policy and rule of the common law in this point, was in effect overthrown by the statute *De Donis Conditionalibus* [*ante* —] made *anno* 13 Edw. I [A. D. 1285], which established a general perpetuity by act of parliament, for all who had or would make it, by force whereof all the possessions of England in some effect were entailed accordingly, which was the occasion and cause of the said and divers other mischiefs. And the same was attempted and endeavored to be remedied at divers parliaments, and divers bills were exhibited accordingly (which I have seen); but they were always on one pretense or other rejected. But the truth was, that the lords and commons, knowing that their estates tail were not to be forfeited for felony or treason, as their estates of inheritance were before the said act (and chiefly in the time of Henry III, in the barons' war), and finding that they were not answerable for the debts or incumbrances of their ancestors (nor did the sales, alienations, or leases of their ancestors bind them for the lands which were entailed to their ancestors),

they always rejected such bills. And the same continued in the residue of the reign of Edward I, and in the reigns of Edward II, Edward III, Richard II, Henry IV, Henry V, Henry VI, and till about the 12th year of Edward IV; when the judges, on consultation had amongst themselves, resolved, that an estate tail might be docked and barred by a common recovery; and that by reason of the intended recompense the common recovery was not within the restraint of the said perpetuity made by the said act of 13 Edw. I. By which it appears, that many mischiefs arise on the change of a maxim and rule of the common law, which those who altered it could not see when they made the change; for *rerum progressus offendunt multa quæ in initio præcaveri sev prævideri non possunt.*

2. It was resolved that it was impossible and repugnant that an estate tail should cease as if the tenant in tail was dead (had he issue or no), for an estate tail cannot cease so long as it continues; but here his intent was to continue the estate tail, and to cease it in respect to the party offending only, and not as to any other, which is impossible, repugnant, and against law. For every limitation or condition ought to defeat the whole estate, and not to defeat a part of the estate, and leave part not defeated; and it cannot make an estate to cease *quoad unam personam* and not *quoad alteram.* But an act of parliament may make an estate cease as if one were dead, [as] 21 Hen. 8 that by the acceptance of a second benefice the first shall be void as if he were dead; and in 10 Eliz., Dyer 274, pl. 41, there is restitution by parliament with a *quoad.* So the policy of the common law may make a *quoad,* as in 22 Eliz., 3 Dyer 369, pl. 48, 49, a marriage *infra annos nubiles* is perfect *quoad dotem,* and *quoad* other purposes it is but *inchoatum et imperfectum.* So if two are jointly and severally bound upon a bond, and judgment is given against one, by which it is become of record as to one, but as to the other it remains a writing as it was before. But no condition or limitation framed by the party's words in his deed can make one and the same estate in any lands cease as to one person and be *in esse* as to another, or cease for one time and revive afterwards (as a rent newly created may). And none can have an estate in tail but parties in estate *secundum formam doni.*

3. It was resolved that if a man makes a gift in tail on condition that he shall not suffer a common recovery, that this condition is repugnant to the estate tail, and against law; for there are divers incidents to an estate tail: 1, to be dispunished for waste; 2, that his wife shall be endowed; 3, the husband of a woman tenant in tail, after issue shall be tenant by the curtesy; 4, that tenant in tail may suffer a common recovery, and thereby bar the estate tail and the reversion or remainder also. And these inseparable incidents which the law annexes to an estate tail cannot be prohibited by condition. And therefore, if a man makes gift in tail on condition that the donee shall not commit waste, or that his wife shall not be endowed, or that the husband of a woman tenant in tail after issue shall not be tenant by the curtesy, or

that tenant in tail shall not suffer a common recovery, these conditions are repugnant and against law; because by the gift in tail he tacitly enables him to commit waste, that his wife shall be endowed, and to suffer a common recovery. And therefore it is repugnant to restrain it by condition, for that would be to give a power and to restrain the same power in one and the same deed. And as to the case of dower, *vide* 22 Edw. 3, 19; accord., 17 Eliz., Dyer 343, the *Earl of Arundel's Case.* And although a common recovery is but a common assurance, yet by the law every tenant in tail has power to suffer it to bar as well the estate tail as the reversion or remainder over; and such act in respect of the intended recompense is not restrained by the statute *De Donis Conditionalibus* (as it has been said), but tenant in tail by a common recovery has *potestatem alienandi* notwithstanding the said statute. As if a man before the said statute had made a gift to one and to the heirs of his body, in this case *post prolem suscitatam* he had by the common law *postestatem alienandi* and therefore in the same case, if the donor add such a condition, that after issue the donee should not alien, it was resolved that the condition in such case had been repugnant, because after issue, by the common law, the donee had *potestatem alienandi,* and then in one and the same deed to give him power *post prolem suscitatam postestatem alienandi tacite* by the law, and in the same deed to restrain him of that power is repugnant and against law. *Pari ratione* after the statute if a man makes a gift in tail on condition that he shall not suffer a common recovery, it is repugnant; for by the gift in tail he has given power *implicite* to suffer a recovery. So if a man makes a proviso that warranty and assets shall not bar the issue in tail, or that a collateral warranty shall not bar the issue or the donor, these provisoes are against law and repugnant: [*Newdigate* v. *Capell*] 6 Eliz., 2 Dyer 227. A proviso good at the beginning by consequence may become repugnant; as if a man by his deed grants a rent for life, proviso that he shall not charge his person, this is a good proviso, yet if the rent is arrear and the grantee dies, his executors shall charge the person of the grantor in an action of debt, for otherwise they would be without remedy, and therefore now it is become repugnant and by consequence void.

But it was resolved, that if a man makes a gift in tail on condition that he shall not alien, this condition to some intent is good and to some void; and therefore if he makes a feoffment in fee, or any other estate by which the reversion is wrongfully discontinued, the donor shall enter for the condition broken, for every act which is prohibited by the law, or which doth wrong, a man may prohibit by condition: *Vide* 10 Hen. 7, 11a [*ante* —]. But (as it has been said) if in such case the donee suffers a common recovery, the condition by the law cannot extend to it, *causa qua supra.* In the same manner is a deed of feoffment to husband and wife in fee on condition that they shall not alien; this is a good condition to restrain a feoffment or alienation by deed, for that is wrongful; but not to restrain an alienation by them both by fine, for that is lawful

and incident to their estate. So if a man infeoffs an infant in fee on condition that he shall not alien; it is a good condition to restrain an alienation during his minority, for that is wrongful; but not to restrain him to alien when he is of full age, for that is repugnant to his liberty which the law gives him in case of a fee-simple. And with these two cases agree: 10 Hen. 7, 11a [*ante* —]; 13 Hen. 7, 23a [*ante* —]: and so you will better understand your books in 33 Assize pl. 11 [*ante* —]; 11 Hen. 6, 6; 21 Hen. 6, 30, 33, pl. 21 [*ante* —], 39; 10 Hen. 7, 11a [*ante* —]; 11 Hen. 7, 6b [*ante* —]; 13 Hen. 7, 23a [*ante* —]; 21 Hen. 7, 11a, b. And it is to be observed that before the reign of Edward IV it was not resolved (as hath been said), that a common recovery should bar the estate tail and the reversions and remainders depending thereon; and therefore the said old books which speak of alienations made by tenant in tail cannot be intended but to restrain discontinuance and alienations which did wrong, and not to prohibit a common recovery, the operation of which was not known and till the reign of Edward IV was not in use. And the reason of *Littleton* [§360, *ante* —] was well observed; who saith, that if a man makes a feoffment on condition that the feoffee shall not alien to any the condition is void; because when a man is enfeoffed of land or tenements he has power to alien them to any person by the law; for if such condition should be good then the condition would oust him of the whole power which the law gives him, which is against reason, and therefore such condition is void. All which are the very words of Mr. Littleton, the reason of which agrees entirely with the resolution of this point in this case. And it was said that the law favors estates tail in possession, and doth not regard remainders or reversions expectant on the estate tail. For it was adjudged in *Capel's Case,* 1 Coke 61b, that if tenant in tail suffers a common recovery, it shall bar not only the estate tail and remainder and reversion but the rent also that he in remainder or reversion has granted. So it was adjudged in 12 Eliz. between *Terling and Trafford,* in the king's bench, that a remainder or reversion expectant on an estate tail is no assets to the heir in debt on bond made by his father. So, Hilary 14 Eliz., it was resolved by all the justices of the common pleas in *Copwood's Case,* that if there be tenant in tail the remainder to the right heirs of J. S., and tenant in tail suffers a common recovery, J. S. being then alive, it shall bar the remainder which was in abeyance and consideration of law.

4. Where the proviso is, "That if when and as often as the said Anthony Mildmay, *&c.,* shall be fully and finally resolved and determined, and shall advisedly, determinedly, and effectually, devise, conclude, and agree, or enter into any communication, promise, or covenant, whatsoever, or shall advisedly attempt, procure, go about, or assent to or for any act or acts, thing or things, for or touching any bargain, sale, discontinuance, alienation, conveyance, or assurance, to be had or made of any of said manors, *&c.,* whereby any estate, *&c.,* may, should, or might, in any wise or by any means, be undone, discontinued, *&c.,* or shall advisedly and effectually attempt, procure, go about, to or for any act or thing,

for or touching any bargain, sale, discontinuance, *&c.,* and [by] the same bargain, or any other open matter, *&c.,* shall attempt, go about, cause, *&c.,* by acknowledgment of any note of any fine, or any warrant or warrants of attorney for any recovery or voucher, or by acknowledgment of any deed, or by any other act or acts, thing or things, whatsoever, in deed or in law, *&c.,* that then immediately after such time of such procuring, attempting, or going about, in form aforesaid, and before any such bargain, sale, discontinuance, *&c.,* had, made, *&c.,* or done, the said use and uses, estate and estates, *&c.,* shall from time to time cease, as only in respect and having regard to such person or persons so attempting, going about, *&c.,* in such sort as if such person or persons, *&c.,* were naturally dead, and no otherwise:"—it was resolved that these words *attempt,* &c., or *go about,* &c., or *enter into communication,* &c., are words uncertain and void in law; and God forbid that the inheritances and estates of men should depend upon such uncertainty; for it is true, *quod misera est servitus ubi jus est vagum; et quod non definitur in jure quid sit conatus, ne quid est* a going about, &c., or communication; and therefore the rule of law decides this point *non efficit conatus nisi sequitur effectus;* and the law rejects conations, goings about, as things uncertain, which cannot be put in issue. For if one who is bound with such a perpetuity goes to counsel learned, to know whether he might alien part for payment of his debts, or for advancement of his younger children, or for any other needful use, is that a breach of the proviso or not? Or if the heir or other in remainder who knew not of the proviso, & *qui habet justam ignorantiam,* thinks that he may levy a fine, and thereupon a note of a fine is drawn, &c., and before it be recorded he knows of the proviso, and then all is cancelled, is that a breach of the proviso? And a hundred such like questions where nothing is done may arise, which the eye of the law never saw, but of late times are invented. And such proviso is full of cruelty, and against the freedom and liberty of a freeman; for this (as if he had bolts of iron on his legs), restrains him to go about; and also it seals up his lips and deprives him of the use of his tongue, for it restrains him to enter into communication. And in the said books aforesaid, where the alienation of a tenant in tail is restrained, no mention was ever made of restraining a going about, or entering into a communication to alien, for that was thought then so idle that there is not any touch of any such matter in any of the said books or in any other book of the law. And in the *Case of Richel,* reported by Littleton, [§720, *ante* —] Richel restrained his sons from aliening, and not from going about or entering into communication of aliening, and yet if he could have restrained the going about it had avoided one of the causes, that his conveyance was against law. For Littleton saith, that if the first son aliened the tenements in fee, then is the freehold and fee simple in the alienee, and in no other, &c., then how can it by any reason be, that such remainder should commence its being and its essence immediately after such alienation made to a stranger who had by the same alienation the freehold and the fee simple? But if

Justice Richil could have restrained the *going about, or entering into communication* or the making of a charter of feoffment or a note of a fine, &c., he might have avoided the principal cause for which his conveyance was insufficient in law. And in the same manner it may be said of the conveyance of Thirning, chief justice, reported in 21 Hen. 6, 33b [*ante* —]. And it was said that a going about or entering into communication was not issuable.

Farther, it was said if a man makes a gift in tail on condition that he shall not make a feoffment, it is a good condition; but if the condition be that he shall not make a charter of feoffment, that is not good, for that without livery (as Littleton saith [§70, *ante* —]) amounts but to a tenancy at will, which tenant in tail cannot be restrained from making. So if a man makes a gift in tail on condition that he shall not make a lease for his own life, it is void and repugnant. But if a man makes a lease for life or years on condition that he shall not alien or lease the lands it is good; for at the common law lessee for life or years might commit waste, which was *ad exhaereditationem* of the lessor, and therefore there was a confidence betwixt the lessor and lessee, and therefore the lessor might restrain the lessee from aliening or demising to another, in whom perhaps the lessor had not such confidence. And therefore it is reasonable that when he who has the inheritance makes a lease for life or years, that he may restrain such particular tenants from aliening or demising, for the benefit of his inheritance. But when a man makes a gift in tail (which is an estate of inheritance and by possibility may continue for ever) and thereby makes the donee chief owner of the land, he cannot restrain him from making any lawful act or estate which doth no wrong to any, and which by law he may do of the same land. So it is, for the same reason, if a man makes a gift in tail of a manor on condition that he shall not make any voluntary grant of any lands by copy according to the custom of the manor, &c., it is not good; but if he makes a lease for years or life with such condition it is good *causa qua supra*. And by these differences you may better understand your books in 21 Hen. 6, 33b [*ante* —]; 8 Hen. 7, 10b; 11 Hen. 7, 6b [*ante* —]; 13 Hen. 7, 23a [*ante* —].

Lastly, the intent of the statute 27 Hen. VIII, c. 10, [*ante* —] as appears by the preamble, was to restore the ancient common law, and to root out and extinguish all subtle inventions, imaginations, and practices of uses, which had introduced many mischiefs and inconveniences mentioned in the preamble. And that was very good and necessary for the commonwealth; for the common law has certain rules to direct the estates and inheritances of lands, and therefore it is without any comparison better to have estates and inheritances directed by the certain rules of the common law (which has been an old, true, and faithful servant to this commonwealth) than by the uncertain imagination and conjecture of any of these new inventors of uses, without any approved ground of law or reason. Note, reader, this judgment agrees with the former judgments, as well in *Corbet's Case* [above] as the cases between

Humble and Cholmley [*ante* —], and *Germin* v. *Ascot* [*ante* —] there cited, and with the judgment in *Dillon and Freine's Case* [*Chudleigh's Case, post* —].

And in this case it was resolved that in the said proviso found at large by the special verdict, there was more than a thousand words, whereas in our books, when tenant in tail was restrained from alienation, there were not twelve words, *haec fuit candida illius ætatis fides & simplicitas quæ pauciculis lineis omnia fidei firmamenta posuerunt.* And so has this case now been adjudged in both courts.

HARDY v. GALLOWAY, in N. Car. Sup. Ct., Oct, 19, 1892.—111 N. Car. 519, 15 S. E. 890, 32 Am. St. Rep. 828.

Suit to foreclose a mortgage including an acre conveyed to the mortgagor by a deed stating that the grantors (Galloway) "retaining for themselves, and their heirs and assigns, the right to repurchase said land when sold, the said Jefferson Evans [grantee] conveying a title for said lands, either by deed or mortgage, without first giving J. B. Galloway and wife, and their heirs and assigns, the privilege of repurchasing the same, renders this deed null and void, otherwise it remains in full force." When Galloway learned of the mortgage to plaintiffs he took possession of the lot, and was in possession when this suit was brought. Judgment for plaintiffs and defendant appeals.

SHEPHERD, J. Considered either as a conditional sale or a contract to reconvey, his honor was entirely correct in holding as void for uncertainty the provision in the deed respecting the right of the grantor to repurchase the land when sold. No time is fixed for performance, nor is there any stipulation whatever as to the price to be paid. The provision, not being a limitation, can therefore only take effect, if at all, as a condition subsequent; and, viewed in this light, we cannot hesitate in deciding that the restriction upon alienation, attempted to be imposed after the grant of the fee, is repugnant to the nature of the estate granted, contrary to the policy of the law, and therefore inoperative. Ever since the statute of *quia emptores,* the right of alienation has been considered as an inseparable incident to an estate in fee, (Co. Litt. 436; Williams, Real Prop. 61, 62; 1 Washb. Real Prop. 79;) and except in some cases, where the restriction is only partial, the law does not recognize or enforce any condition which would directly or indirectly limit or destroy such a privilege,—*iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem.* Accordingly it has been held by this court that a condition that a devisee in fee shall not sell or incumber his land before attaining the age of 35 is void, "because it is inconsistent with the full and free enjoyment which the ownership of such an estate implies." *Twitty* v. *Camp.* Phil. Eq. 61. To the same effect has it been ruled as to a condition that a devisee in fee shall make oath "that he will not make any change during his life" in the testator's will respecting his property, (*Taylor* v. *Mason,* 9 Wheat. 350,) or that

he shall not offer to mortgage or suffer a fine or recovery, (*Ware* v. *Cann,* 10 Barn. & C. 433,) or that he shall contract in writing not to alienate before the proceeds of certain realty are paid to him, (*Mandlebaum* v. *McDonnell,* 29 Mich. 78,) or that land devised to a number of persons shall not be divided, (*Smith* v. *Clark,* 10 Md. 186.) Such conditions are not sustained where they "infringe upon the essential enjoyment and independent rights of property, and tend manifestly to public inconvenience." 4 Kent, Comm. 131; Bac. Abr. tit. "Conditions;" Shep. Touch. *131. "A condition annexed to an estate given is a divided clause from the grant, and therefore cannot frustrate the grant precedent, neither in anything expressed nor in anything implied, which is of its nature incident and inseparable from the thing granted." *Stukeley* v. *Butler,* Hob. 170. While unable to find any decision exactly in point, we feel assured that our case falls within the principle stated and illustrated by the foregoing authorities. The restriction is certainly inconsistent with the ownership of the fee, as well, it would seem, as against public policy. The right to repurchase is of indefinite extent as to time, (it being reserved to the grantors, their heirs or assigns,) and may be exercised whenever the property is sold, although no amount is fixed upon as purchase money. In other words, we have an estate in fee without the power to dispose of or incumber it, unless first offering it for no definite price to the grantors, their heirs or assigns. The condition is repugnant to the grant, and therefore void. Even if the right to repurchase could be sustained, the defendant has no cause of complaint, inasmuch as the court in decreeing foreclosure has ordered that 30 day's notice of the sale shall be personally served on him. The exception to the insufficiency of the description in the mortgage from Evans to the plaintiffs is plainly untenable. *Henley* v. *Wilson,* 81 N. C. 405; *Euliss* v. *McAdams,* 108 N. C. 507, 13 S. E. Rep. 162, and the cases cited. * * *

Judgment affirmed.

In a conveyance of land to trustees for the benefit of persons named, a provision that the trustees should not put the land to any use injurious to the other land of the beneficiaries in the same neighborhood, nor sell it, without the consent of all the beneficiaries, was held void, as tending to a perpetuity, though, the provision appeared to be beneficial and the land could be sold if all should so agree. Winsor v. Mills (1892), 157 Mass. 362, 32 N. E. 352.

CHAPTER VIII.

FUTURE ESTATES.

REMAINDERS.

KENT'S COMMENTARIES, vol. 4, p. *197.

A remainder is a remnant of an estate in land depending on a particular prior estate, created at the same time, and by the same instrument and limited to arise immediately on the determination of that estate, and not in abridgement of it.

BRACTON, Book II, fol. 18b (as translated in Digby's Hist. Real Prop. 172.)—A. D. 1256-60?

Further a gift may be made to more persons than one at one time to follow in succession according to the limitations of the gift; as if a man has more sons than one and makes a gift to the eldest in the following terms: "I give to A my eldest son so much land to have and to hold to him and his heirs begotten of his body, and if he have no such heirs or if he have had heirs and they have failed, then I give that land to B my younger son, and I desire that the land should revert to B to hold to him and the heirs begotten of his body, and if he have had no such heirs or if he have had heirs and they have failed, then I desire and grant for myself and my heirs that the aforesaid land should revert to C my third son, to have and to hold to him and his heirs begotten of his body, and so on; and if the aforesaid A B C have died without heirs begotten of their bodies, then I desire that the land aforesaid should revert to me and to my other heirs." This [reversion] indeed would happen without express words, by an implied condition, unless the donor were to direct otherwise concerning the land. Further if the gift be made in wider terms, as if it be said, "I give to you so much land, &c., to have and to hold to you and your heirs or to whomsoever you wish to give or assign it in your lifetime or to leave it at your death," the gift is valid because of the intention and assent of the donor, although it appears to be opposed to the law of the land.

See the discussion of the common law as to remainders after a fee in Willion v. Berkley, ante p.

To begin in Future without Particular Estate.

HOGG v. CROSS, in Queen's Bench, Mich. 33 & 34 Eliz., A. D. 1593—Abridged from Cro. Eliz. 254.

Ejectione firmæ of a house and garden in London. J. Warren seised of it by burgage in fee, devised it to his wife for life, and after his death she married Rice, who leased to plaintiff. Before making the will, testator

made a deed of feoffment to G, his son, *habendum* after the death of the feoffor to said G in tail, and made livery of seisin *secundum formam chartae.* Whether anything passed by this was the question.

G. Wray, for the plaintiff, argued that the feoffment was void, and nothing passed, and then the will made afterwards was good: for when no estate is expressed in the beginning of a deed, but only an implied estate for life, as here, and by the *habendum* an express estate is limited. this controls the implied limitation; and if this be void and repugnant in law, as it is here, being after the death of the feoffor, all is void. But if there be an express limitation in the beginning, if the habendum be repugnant, it is void, and the first is good. And though livery be made, yet it is limited to the terms of the charter of feoffment, which is void, and so all is void; for it is but the execution of a void deed, citing Mayn's Case.

Dalton, for the defendant, argued that an estate for life passed by the premises and the *habendum* was void.

ALL THE JUDGES resolved the contrary: for it appears to be the intent of the feoffor that no estate shall pass but *in futuro,* viz. after his death, which is against law; and it being all the purport of the deed, nothing shall pass in any other manner; for nothing shall pass by the premises but according to his intent, which is nothing; for he intended not to pass the freehold immediately. But if one grant a term by deed, *habendum* after his death, this passes by the premises; for the premises are sufficient to carry it, and the *habendum* shall not utterly destroy it. But it is otherwise here, where it is to take effect by limitation of the party, which is void; and the livery is also void to execute a void deed. And without further argument it was adjudged for the plaintiff.

BUCKLER v. HARVY, in Common Bench, Mich. 37, & 38 Eliz.—A. D. 1597. —Cro. Eliz. 450, 2 Coke 55, 2 And. 29, Moore 423—Abridged from Croke.

Ejectione firmae. Upon special verdict, the case was, tenant for life, remainder to Buckler in tail. The tenant for life made a lease for four years, and afterwards granted the reversion, to have said tenement after midsummer next ensuing for the life of the grantor. After midsummer the lessee for years attorned, the term expired, the grantee entered, the grantor levied a fine to him *sur conusance de droit come ceo, &c.;* the tenant in tail in remainder entered for the forfeiture, and let it to the plaintiff; upon whom the defendant, being the grantee in reversion, re-entered, the first tenant for life being yet alive. The first question was whether by this grant of the reversion, *habendum* after midsummer, and the attornment made, the grant was good or void. Secondly, admitting it to be void, the grantee entering in disseisin, and the tenant for life levying the fine to him, whether this be a forfeiture.

WALMSLEY, J. A grant of a reversion, *habendum* after the death of

the tenant for life is good; for so is the course of fines, for this limitation is as to the having the possession, and not as to having the reversion, for that is in the grantee presently. But when a reversion is granted *habendum* after a future day, he is thereby excluded to have the reversion until that time, and therefore it is utterly void. The *habendum* shall not be void but where it is not requisite, as in release of a right, or grant of a term; but here the *habendum* is necessary to show the estate. * * *

ANDERSON, C. J. It is clear that it is a forfeiture. * * * For the first point, I doubt; but I conceive the grant to be void, and that he by his entry is a disseizor.

BEAUMOND, J. The grant is void: for if the estate had passed by the livery, it had been clearly void; and the same is law here; for the *habendum* is not void otherwise but in regard that no estate is limited in the premises. And because the *habendum* limits the estate, and all the estate depends on that which is void; and the grant being void, the grantee by his entry is a disseisor. * * *

Upon these reasons it was adjudged to be a forfeiture, and the entry of him in reversion to be lawful.

Afterwards this case was argued in the Queen's Bench on another special verdict, and the judges of that court were of the same opinion. Buckler v. Hardy (1597), Cro. Eliz. 585, 5 Gray P. Cas. 44.

BARWICK'S CASE, in Exch., Trinity, 39 Eliz.—A. D. 1600.—Abridged from 5 Coke 93b.

Information of intrusion into a house and lands in York County, against P. Barwick and others. Queen Elizabeth having the reversion of lands in lease for years to H. Barwick, demised them to him by letters patent to have from the day of the making of such letters for the lives of three others and the survivors of them; and under this demise the defendant claimed. Whether the lease was valid was the question. And after many arguments at bar and bench, judgment was given by PERIAM, C. J., and the whole court of exchequer, for the queen; and in this case these points were resolved.

OPINION OF COURT. 1. When the queen demised the manor from the day of making the letters patent, that day is without question excluded.

2. An estate of freehold could not by the common law begin *in futuro* but ought to take effect presently in possession, reversion or remainder. The difference is between a lease for life and a lease for years: for a lease for years may begin *in futuro,* but not a lease for life. As if a man makes a lease for years to begin at Michaelmas next ensuing, it is good; but if a man makes a lease for life to begin at Michaelmas, it is void; and the reasons and causes of this difference are: (1.) Because a lease for years may be made without livery of seisin, but so cannot an estate of freehold without livery, either in fact or

in law. And therefore when a man makes a lease for life to begin at a future day he cannot make present livery to a future estate, and therefore in such a case nothing passes. And it was said that letters patent under the great seal amount to a livery in law; and therefore, by letters patent a lease cannot be made for life to begin at a day to come. (2.) If any freehold should pass presently by the letters patent from a day to come, then the queen in the meantime would have a particular interest and term without any donor or lessor, which would be against the rules of the law. But no such consequence will follow in the case of a lease for years; and therefore it was resolved in the case at bar that the lease for three lives was void, because it was to begin the next day after the teste of the letters patent. And if the lease should be good the queen would have an interest for the day, and although the lease was to begin the next day after the teste of it, it is all one in law as if it had been to begin twenty or forty days or years to come, for the difference of the time doth not make an alteration of the law in such case. And in this case it was agreed, that if a man makes a lease for years to A & B, the remainder to C for life, in that case the lessor ought to make livery to A & B before their entry, and by the livery to A & B, C shall take a perfect estate for life by way of remainder, by force of the livery made to the lessees for years.

SWYFT v. EYRES, in King's Bench, Trinity, 15 Car. 1.—A. D. 1640.—Abridged from Cro. Car. 546.

Debt by Swyft, subchantor, and one of the vicars choral of Litchfield, against Eyres and others, lessees of Sir Edward Peto, to recover under the statute of 2 Edw. 6 for not setting out tithes. On *non debit* pleaded, it was found by special verdict, that the subchantor and vicars choral, being seized in fee of the rectory on which the tithes are claimed, leased them to John Peto for 42 years, and later, by indenture reciting that Richard and John Woodward had bought that lease, granted the tithes to them "*habendum* from and after the said term and determination thereof and the years in the said indenture comprised," &c, then to Richard Woodward for one month, and after that month fully expired then to John Woodward and his heirs and assigns forever, rendering rent, &c.; and later by another indenture misreciting the facts, granted the same to Humphrey Peto and his heirs. Defendants' lessor claimed under both indentures. The only questions were as to the validity of these indentures.

As to the first, ALL the JUSTICES argued for the plaintiffs, that they have a good title, notwithstanding this indenture; for this indenture is merely void, because it is to convey an inheritance *in futuro;* for the month is not to begin until the forty and two years be expired; and it is a grant of *interesse termini,* and no grant of a reversion; for the inheritance is granted therein, which was not in the lease before; and as it is an *interesse termini* for the tithe hay, so ought it to be for the

residue, for there cannot be fraction of the estate; and then, being only an *interesse termini* in Richard Woodward, there cannot be a grant of the remainder or reversion to commence *in futuro*. And to prove this see 2 Coke 55, *Buckler's Case* [reported herein ante p. On the second indenture they held defendant had title notwithstanding the misrecital, although such mistake would void letters patent by the king.]

Acceleration of Remainders.

RICKMAN v. GARDENER, in Common Pleas, Mich. 2 & 3 Phil. & Mary.—A. D. 1556.—Dyer 122a.

A man seized of land in fee had issue two sons and a daughter, and made his last will and testament in writing after the statute, &c., and thereby devised his lands to his wife for the term of ten years after his death, *remainder to his youngest son and his heirs forever; and that if either of his two sons should die without issue of his body lawfully begotten, that then the land should remain to his daughter and her heirs in fee.* And afterwards, viz., in the life-time of the testator, the said youngest son died without issue, and then the father died without making any alteration of his will. Whether the eldest son shall have the land as tenant in tail, or in fee-simple by the intention of the devisor, or the daughter? was the question. And it was demurred in law in waste by Rickman and his wife against Gardener. And by the opinion of all the judges of C. B. this was a good remainder to the daughter, notwithstanding the death of the devisee without issue in the life-time of the testator, and they would not argue the case. See Perkins, accordingly, in Devise, fol. 120 [f. 246, § 568] where the case is a man devised his lands to one for life, remainder over in fee; the devisee for life died in the life-time of the devisor, and then the devisor died: he in the remainder may well enter and execute his remainder. But see *contra* in this matter E. 7 Eliz. fol. 237.

FULLER v. FULLER, in B. R., Hilary, 36 Eliz., A. D. 1595.—Moore 353, Cro. Eliz. 422.—Abridged from Cro. Eliz.

Trespass for lands. Upon not guilty pleaded, a special verdict found, that "Henry Fuller, seized of socage lands in fee, had issue, John, Henry, Richard, and Edward; and devised the land to Richard and the heirs of his body; and after his death without issue, to Edward in tail, and then to John in tail, remainder to the right heirs of the devisor. Richard died leaving issue, T, and W. Afterwards Henry, the devisor, said, 'My will is that the sons of Richard, my deceased son shall have the land devised to their father, as they should have had if their father had lived, and had died after me.'" The devisor died and T. the son of Richard entered, on whom John, the eldest son of the devisor entered. T. re-entered and John brings trespass.

This case was argued by *Towse* for the plaintiff, and by *Foster* for the defendant: and two points were moved—1, whether by reason of this new speech and declaration after the death of Richard, Thomas his son shall take as a devisee; 2, admitting that it is not a good devise to Thomas, whether John, the eldest son, shall have it during the time that any issue of the body of Richard be alive, or whether Edward in remainder should enter presently, because it is not limited unto him until the death of Richard without issue.

GAWDY [J.] held that Thomas should not take it; and that there was not any difference betwixt this and *Brett's Case* [v. *Rigden,* Plowd. Com. 345, *ante* —]. There the devise was in fee, here it is in tail, which is all one: and this speech of the devisor is not of any effect; for there is such a speech in *Brett's Case.* But the devise of the manor of D, which he had not, was good with a new publication after he had purchased it; so of a devise to an infant *in ventre sa mere* with new publication after its birth, for there is his will written "that he should have it," and it is expressed by his words afterwards. But here there is not any written will, that the son of Richard should have it, and he cannot have it as his heir. Wherefore, &c. As to the second point, there is no doubt but that he in remainder shall have it presently; for the devise being void to the first, it is as if it never had been made; so it is if the first devisee refuse, he in the remainder shall have it presently; as 37 Hen. 6 [36a, pl. 23, cited in *Newis* v. *Lark ante* —], Plowd. Com. 414; accord, Mary, Dyer [126b, *ante* —], *Jasper Warren's Case* [v. *Lee*]. Wherefore the plaintiff hath not any cause of action, &c. And in this point all the other justices agreed with him; and as to the first point CLENCH agreed also; but FENNER and POPHAM, *e contra.* * * * But for the second point, in regard they all agreed against the plaintiff, it was adjudged presently for the defendant.

When All to Particular Tenant and So No Remainder.

ANONYMOUS, Mich. 29 Eliz., 1587.—Moor 247.

Puckering, sergeant, moved that a lease was made to three, *habendum* to them for 99 years, viz: to the first if he so long live, and if he die to the second for the residue of the term of years, and if he die within the term then to the third for the residue of years. And he moved that if the first die, what estate the second had. PERRIAM and WINDHAM [JJ.] held that he had a good estate for so many of the years as yet remained; for PERRIAM said that this inured as a grant of so many years in remainder, and the law may be applied to the intent of the parties; but he said if it were for the residue of the term and no more, that would be void to the second, because the term is ended by the death of the first. ANDERSON [C. J.], *contra:* for he said that it might not inure by way of remainder, because there was no estate in being during the particular term; and he would not allow the diversity made by PERRIAM, because the residue of the term is intended as a

residue of years, for the term is not that continuance for years. PERRIAM changed opinion on the diversity, but he held the law yet good for the estate of the second, as before, for this inured as a new grant. ROODS was of the same opinion. *Sed quaere*, for they were all parties to the deed, wherefore it would be better than by way of remainder to one who is not party, as the case in Dyer 150.

GREEN v. EDWARDS, in the Common Pleas, Hilary, 33 Eliz., A. D. 1592.—Cro. Eliz. 216, Moor 297.

Demurrer. Land was let to J. S. for ninety years if he so long live, and if he die within the term, then his wife shall have it during the whole residue of the term aforesaid, J. S. died within the term, and the question was whether his wife should have it during the residue.

By all the Justices, resolved, that she shall not, for the term was wholly determined, and the limitation to her was void; for as a remainder it cannot inure, for a remainder must be created with a particular estate, and is to be limited for a certain estate, viz. for years, life, in fee, &c. And here no certain estate is limited to her; for although it is limited to her during the residue of the term, and so shall be intended a lease for years, yet for as much as every lease for years is to have a certain commencement and ending, here it is uncertain whether she shall ever have it, for J. S. may outlive the ninety years. And so a termor cannot grant the term after his death, and so the remainder here is void. ANDERSON, C. J., said that if the wife had been a party to the deed this peradventure might have been good to her, not by way of remainder, but by immediate grant and demise for so many years which shall be to come; and *durante termino* shall not be taken for the interest but for the time: which WALMSLEY and WINDHAM [JJ.,] did expressly deny, for they held it is at first void for the uncertainty when it shall commence, or whether it shall commence. It was adjudged that the wife took nothing.

Cecil's Case (8 Eliz., 1566), 3 Dyer 253b, was so decided on a lease for 41 years to W if he so long live, and if he die within the term to E for the residue, and if she die within the term to W's son for the residue. But the reasons are not so fully stated.

When in Abridgment of Prior Estate or on Condition.

COLTHIRST v. BEJUSHIN, in Common Bench, Easter, 4 Edw. 6.—A. D. 1551.—Abridged from Plowden Com. 21 to 35.

Trespass quaere clausum. Defendant pleaded not guilty and further that the prior of Bath, being seised in fee of the close wherein the trespass is alleged to have been committed, leased it by deed indented to Henry Bejushin and Eleanor his wife, for term of their lives, remainder to William, a son of said Henry and Eleanor, for life, if he should always reside on the place; and if he should die before said Henry and Eleanor, then the said prior appointed it to Peter Bejushin.

another son, who is the defendant herein, if he should likewise reside on the place; that by force of this lease said Henry and Eleanor entered and were seised, and being so seised William died, and then Henry and Eleanor died; after which Peter, the defendant, entered and was and still is seised and at all times since his entry has resided on the place; which is the trespass complained of. He gave color to the plaintiff, and the plaintiff demurred.

Pollard, sergeant, argued for the plaintiff, that the remainder is void.

1. Because the limitation of the remainder is here appointed during the particular estate, and every remainder ought to be limited to take effect after the particular estate, and if limited to take effect during the particular estate it is repugnant to the first estate, and so utterly void. So here this remainder is void, because it is limited to take effect immediately after the first estate for life is determined; and when the first estate for life is determined, then the first remainder for life commences; and if it so commences, it follows that the second remainder cannot then begin, for it would avoid the first.

2. This remainder is void, because it is limited to commence upon condition, which no remainder may do, for conditions always inure in privity, so that none but privies shall take advantage of them; for none shall enter for a condition broken except the lessor, donor, and feoffor, or their heirs. And as none but privies shall avoid an estate before made for breach of condition, so none but privies shall take a new estate by performance of a condition. If I make a lease for life, upon condition that if the lessee do not pay me 20£. at such a day then it shall remain over to a stranger in fee, and he fails of payment, this is a void remainder, for the cause stated. (M. 18 Henry 8, 3 b, arguendo.) But if I make a lease for life, upon condition that if the lessee do a certain act he shall have the fee, and he does it accordingly, there he shall have the fee; because he is privy to the condition, and therefore he shall take the benefit of it. And so the diversity appears where the estate upon condition is appointed to a privy, and where it is to a stranger. In our case the remainder is limited to the defendant if his brother first dies in the life of his parents, and if he does not, then the defendant shall not have the remainder. So that the remainder is to commence upon a contingent, and for this cause it is not good. If an estate is made for life upon condition that if the tenant for life die, then it shall remain over, this remainder is good because it commences upon the termination of the particular estate, which is certain, and so no condition; M. 27 Henry 8, 24 a, by Fitzherbert, J.; but in our case it is uncertain, and may be performed or broken.

3. This remainder is void, because in every state it is necessary that conveyances be certain, for certainty is the mother of repose, and uncertainty is the mother of contention, which our law has ever guarded against. For which reason it has ordained certain ceremonies to be used in the transmutation of things from one to another (and especially

of freeholds, which are of greater price and estimation in our law than other things) in order to know the certain times when things pass; and therefore in every feoffment the law has appointed that livery and seisin shall be had, and in every grant of reversions or rents that attornment shall be made; which are certain points, containing the time when, and to whom such estates do pass. And for the same reason the law has ordained and appointed that every remainder shall have three things, besides those before mentioned, as rules whereby to know when remainders are good, viz.: *a,* an estate precedent, made at the same time that the remainder commences; *b,* that the particular estate shall continue when the remainder vests; *c,* and that the remainder be out of the donor at the time of the livery. If any of these three fail, the remainder is void. And therefore as to the first point, if the lessor confirms the estate of his tenant for years, the remainder in fee, this remainder is void, because the estate for years was made before and not at the time of the remainder, and he shall not take it as a grant of the reversion, because he is not a party to the deed. So if the lessor disseizes his tenant for life, and afterwards makes a new lease to him for life, remainder in fee, this remainder is void, for the same reason. As to the second point, the precedent ought to continue when the remainder vests; and therefore if a man makes a lease for life, and that the day after the death of the tenant for life it shall remain over, this remainder is void, because the first estate is determined before the remainder is appointed. As to the third point, that the remainder ought to pass out of the lessor at the time the livery is made, or else it shall be void, this is proved by the common case where a lease is made for life, remainder to the right heirs of a person living; this remainder passes out of the lessor presently, though it does not vest presently. But in our case the estate precedent was made long before the remainder, and therefore the remainder shall be void; and also the remainder is not out of the lessor at the time of livery, but is appointed to pass upon the performance of a condition, for the words are, if the son in the remainder die, *then* it shall remain to the defendant.

Coke, sergeant, to the contrary: The remainder here is good, for first there is an estate on which the remainder may be built, and the remainder here is appointed upon it. The cause why the remainder shall not be good is alleged in two grand points: *a* because the fee does not pass presently out of the lessor; and *b,* because the remainder may not pass upon a condition. It seems to me that the remainder passes out of the lessor presently, as in Littleton's case (Litt. § 350), viz. if one makes a lease for 5 years, upon condition that if he pay to him 20£. within the first two years, that then he shall have fee, the fee passes out of the lessor presently. So shall it be here. And sir, a remainder may well commence upon condition, as if a lease is made for life, upon condition that if J. S. marry my daughter during the estate for life it shall remain to him, this is a good remainder.

and yet it commences on condition. That which I may give without condition I may give on condition. If one makes a disseisin to the use of a stranger, and the stranger afterwards agrees to it, he shall have the land thereby. And if land may be transferred by such assent, all the more may it pass upon a condition, especially with a freehold estate precedent.

HALES, J., said: It seems to me that the remainder is good. When the lessor appoints the remainder to the defendant as above his intent may be perceived herein, and it is reasonable that the same should be fulfilled, viz. that the defendant should have it in such manner and form as it is appointed. And this limitation is not against law, nor against any principle thereof, as I shall prove hereafter; neither is it repugnant in itself, therefore it is good. And to prove that it is not against law, I shall put some cases founded upon like reason, and which will also answer the reason of that which has been alleged, viz. that the remainder ought to pass out of the lessor presently, which I utterly deny. And therefore if I made a lease for years, the remainder for life, upon condition that if he in the remainder do not such an act, the remainder shall be void, now before the condition is broken the remainder is good, and in him to whom it is appointed; but if the condition is broken, then the remainder is out of him, and in the person of the lessor again, which proves that a freehold by agreement had upon the livery may be transferred from one to another by matter *ex post facto*. So if one grants a rent or reversion, and afterwards attornment is had, now the reversion shall pass thereby, and yet it did not pass presently by the grant, which case proves that upon the assent first had, and act done afterwards, a freehold may be divested out of one and vested in another. So if a man makes a lease for life by deed, remainder to the king, and makes livery of seisin, the remainder does not pass presently, but if the deed is afterwards enrolled, then the remainder shall be in the king from the time of the first livery (T. 1 Hen. 7, 30b, 31a). So that by the limitation declared upon the livery, the remainder which did not pass out of the lessor at the time of the livery shall pass by the act done afterwards. So in *Plesington's Case* (H. 6 R. 2; Fitz. Abr. *Quid Juris Clam.* 20), one condition was that if the lessor died within the term, then the lessee for years should have the land for life, and it was there held, that if the lessor died, his estate should be enlarged *causa qua supra*. So if one makes disseisin to the use of J. S., now the freehold is not in J. S.; but if J. S. afterwards agrees to it, then the freehold is in him. (P. 12 Ed. 4, 12 pl. 23; Fitz., Disseizin 3; Brooke Abr. 66, Agreement 4.) Which cases prove that when livery is made, or when a man first meddles with the possession of land, and thereupon words are spoken, there by force of such words and of some act afterwards done, a freehold may be transferred from one to another. So in the principal case, livery is made, and thereupon the lessor hath declared and ap-

pointed that if William die living the husband and wife, then it shall remain to the defendant; in which case I will readily agree that the remainder does not pass out of the lessor until William is dead, and when he is dead, it shall well pass by force of the first words annexed to the livery.

To make a difference where the fee is appointed upon condition to a privy, and where to a stranger, is but an idle and *insignificant* conceit. As to what has been said touching the words *if William die living the husband and wife, then it shall remain* to the defendant, which word *then* shall be intended presently during the lives of the husband and wife, so as to defeat their estate; sir, the sentence is not to be so understood, but it shall have a beneficial construction, viz. that then it shall remain as a remainder ought to do, and that is, to vest, and be executed after the death of the husband and wife. As if a gift in tail is made to one upon condition that if he do such an act, then the land shall remain to his right heirs, this word *then*[1] is not so to be understood as to avoid the estate tail, and to be executed presently upon the performance of the act, but it must be taken in this manner, viz. that upon the performance of the act the remainder shall vest, and after the estate ended it shall be executed. So shall it be understood here, and then there is no such repugnancy as has been alleged, nor is there any prejudice to a stranger. But if any prejudice shall arise to a stranger thereby, then the remainder shall not be good. As if it was that if William die, then the defendant shall have the land during the lives of the husband and wife, this should be void in respect to the prejudice to the particular estate, for things which are done in prejudice of others shall be void.

HINDE, [J.] The remainder is good. That the remainder commences upon condition, sir, I deny that: for the remainder is limited to the defendant if William die living the husband and wife, which is not a condition, but a limitation when the remainder shall commence; for no words make a condition unless such as restrain the thing given, as upon condition that he shall not do such an act, or the like; but here these words limit the time when the remainder shall commence, and do not restrain the thing given, and therefore they may not be called a condition, but rather a limitation. If I make a lease for life upon condition that if the lessee die I may enter, this is only a limitation of the time of my entry; which is void, because it is no more than the law says; and it is no condition because it does not restrain the estate. So if I make a lease for life upon condition that if the lessee does waste, and I recover the place wasted, I shall enter into it, this is no condition because it does not restrain the estate. So if I make a lease for life upon condition that if I recover in waste any parcel, that I shall enter into the whole land, &c., this is a condition for that part in which no waste was done, for the condition is restrictive, and goes in de-

[1] On this point see Boraston's Case *post* —.

feasance of that part. The common case of fines are, where an estate tail is that if it happen the donee die without issue, that then it shall remain to a stranger, which is not a condition, but a limitation of the time when the remainder shall commence. So in the principal case, it is but a limitation and an explanation of the time when the remainder shall commence. And I do not see any cause or reason why I may not make a remainder to commence and vest in the midst of a particular estate, as well as I may at the beginning or end of a particular estate: for there is no repugnancy, but that it may commence to vest at any time during the particular estate; for when the fee simple is in me I may condition with it as I please, if it be not contrary to law, which it is not in ours, or such like cases. But if I make a lease for life upon condition that if J. S. pay me 20£. then I shall enter upon the tenant for life, and then it shall remain, &c., this remainder is void; because by the entry the first livery is annulled and defeated, and then there is no particular estate continuing upon which the remainder may depend: but here there is no such matter, for which reason the remainder seems to me to be good. And if it be a condition, yet the remainder may commence upon it well enough, seeing it is the will of the lessor that it should be so. Wherefore it seems to me that the plaintiff shall be barred.

BROWN, J., spoke to the same purpose, on another day; and argued that the remainder should be good upon condition. And if it should not be good upon condition, he said it should be good to the defendant as a grant of the reversion; and therefore the plaintiff should be barred.

MONTAGUE, C. J. If it was a condition, yet the plaintiff has not enabled himself to take benefit of it; for, as been said. none but privies shall take benefit of conditions by entry, by the common law. And now by the statute of 32 Hen. 8, c. 34, the grantees and patentees of the king shall also take advantage of conditions. And here the plaintiff has not conveyed to himself a capacity to take benefit of the condition, as privy, nor as patentee or grantee of the king, nor in any other manner. And further the remainder seems to be good; for in the first place, it appears to me that there is not any condition here whereupon the remainder depends, but that it is a limitation and appointment of the time when the remainder shall vest, and in this point I agree with my brother *Hinde*. But even admitting it to be a condition, or call it a limitation, or give it what other term you please, yet it seems to me that the remainder is good; for every man who is lawful owner of any land, may give it to what person, in what manner, and at what time he pleases, so that his gift be not contrary to law, nor repugnant. Here it seems to me that his gift is not contrary to law. In 10 Ed. 3, 30 pl. 33, Fitz, Assize 161, a man made a lease for years to J. S. and in surety of his term he made him a charter of feoffment, upon condition that if the lessee was disturbed within the term, that then he should hold the tenement to him and his

heirs, and J. S. was disturbed and afterwards ousted, and he brought an assize, and it was awarded that he should recover; which proves that a freehold may pass by a condition well enough, where the condition is expressed at the time of the livery. And by the reason of this case a man may make as many remainders as he will to commence upon the like condition; and although he is in the one case immediately privy, and not in the other case, this is no matter to stay the remainder, for his livery shall be taken most strongly against himself. When I was at the bar I was counsel with one Mr. Melton (M 27 Hen. 8, 24 pl. 2), and the case was thus: a fine was levied *sur grant & render,* whereby the conusee granted and rendered to the conusor the tenements in tail upon condition that the conusor and his heirs of, &c., should bear the standard of the conusee when he went to battle, and if the conusor or his heirs failed to do it, then the land should remain to a stranger; and I moved the case then to the court, and it was greatly wondered that the fine upon condition was received. But Fitzherbert, J., then held the remainder good, and they did not wonder at it, nor held it any great question but that it might commence upon condition.

Adjudged for defendant.

COGAN v. COGAN, in C. B., Easter, 38 Eliz.—A. D. 1597.—Abridged from Cro. Eliz. 360.

Trespass. Upon demurrer, the case was, that John, seised in fee, let to Robert for life, remainder to Catherine, the defendant, for life, "*provided,* that if John, the lessor, had issue a son during life, who should live to the age of five years, that the estate limited to the defendant, Catherine, should cease, and it should remain to the said son in tail." The lessor had issue, the plaintiff, who attained his age of five years. Whether the remainder limited to the defendant shall cease and the remainder limited to the plaintiff were good, was the question. THE COURT resolved for the defendant after the sergeants had argued. ANDERSON, [C. J.], said there are certain rules in law touching remainders, viz. that a remainder ought to pass at the first by the livery, and shall not take effect with a condition precedent, nor shall begin upon such a condition; and although *Colthurst's Case* [v. *Bejushin ante* —] gives color thereto, and that the remainder in question shall be good, yet he held not that case to be law on this point; for a remainder depending upon a condition precedent is merely void. And further in this case, an entry is requisite to avoid the remainder for life; for a freehold cannot determine without the ceremony of entry, but otherwise it is of a lease for years. Wherefore this remainder depending upon a limitation which is against the rules of law, is void. WALMSLEY, [J.], to the same intent: The remainder is void, by Littleton, and by the ancient grounds of the law for, the remainder (by Littleton) ought to pass at the time of the livery; and the nature of a livery is a giving, and there cannot be a giving, but there ought to be one to take, *in præ-*

senti or in expectancy, so as the law shall preserve it in the interim; and there needs not be any deed of a remainder, which proves that it passes by the livery. And by *Richil's Case* the remainder shall take effect when the particular estate takes his effect, and ought to pass presently by the livery, or otherwise it shall never pass; and although in *Colthurst's Case* the condition be precedent in words, yet it is subsequent in reason; wherefore it may be well maintained by law. And a remainder cannot pass by contingency; for then there would an absurdity follow, viz., there should, by the first livery, be an immediate reversion, expectant on the remainder for life; and afterwards this remainder shall be turned out, and the reversion also; and a new remainder and reversion should come in place of them; so as there should be turnings out and turnings in at several times, by one livery which was made at one time. But as touching the ceasing of the remainder, he conceived it might very well be without any entry, by the operation of law, the particular estate remaining in being. Wherefore, &c. BEAUMOND, [J.], to the same intent: For a remainder ought to begin and be created with the first livery, and concurrent with the other estate; and cannot afterwards begin upon a condition. And he said he never had heard or read that a proviso could create a remainder, although it might determine a remainder; but he held that a remainder of an estate of freehold or inheritance cannot cease without entry or claim, no more than an estate of freehold in possession. OWEN, [J.], agreed with BEAUMOND, [J.], *in omnibus,* for the reasons before specified. Wherefore it was adjudged for the defendant.

Statute of New York, Mich., &c.. "A remainder may be limited on a contingency, which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder shall be construed a conditional limitation, and shall have the same effect as such a limitation would have by law." N. Y. R. S. (1828), pt. 2, c. 1, t. 2, Art. 1, § 27; Mich. R. S. (1846) c. 62, § 27, C. L. (1897) § 8809; Minn. St. (1866), c. 45, § 27, R. L. (1905), § 3216; Wis. R. S. (1849), c. 56, § 27, St. (1898), § 2051.

CHOMLEY v. HUMBLE, in Common Bench, Hilary, 35 Eliz.—A. D. 1594.—Cro. Eliz. 379, 1 And. 346. Abridged from Croke.

Trespass. On demurrer, the case was, a feoffment was made to the use of one for life, remainder to Chomley in tail, remainder to another in tail, remainder to the lord chamberlain, with this proviso, "that if any of them in remainder go about to levy a fine, or do any act whereby the uses limited shall not take effect according to the limitation, then the estate of him who so goeth about shall cease as if he were naturally dead and no otherwise." Whether this were a good proviso, was the question.

The Court, after argument on either side, delivered their opinion, that it was not good. ANDERSON, [C. J.], said, at the common law the *cestui que use* had nothing: and an estate of inheritance at the common law cannot cease; and the Statute of Uses does not help it; for the statute cannot help any use where there is not any person who is seised to the use.

WALMSLEY, [J.]: The proviso that it shall cease as if he were naturally dead is void and without sense; for if he were dead, it should descend to the son, and he should be in in the *per* by the father, and it should come unto him *quasi by degrees and steps;* but that cannot be when the father is *in esse* and living: wherefore the words in the proviso to this purpose are void and without any signification, and they are as if they had never been mentioned; and so it is an estate tail absolute and without condition. But in entry into religion the land shall descend to the son, for the law reputes him dead. But if an act of parliament had been made as above it should be good enough, and should make a descent to the son without death; but by conveyance there cannot any such descent be made; and an estate of inheritance in land cannot be made to cease by any conveyance without some other act doing.

BEAUMOND [J.], *ad idem:* An estate in tail cannot cease at the common law; no more cannot it in use at this day; for it is an estate executed at the common law; and the issue cannot have a formedon, living the father; and that feoffees at this day should be seized to his use is absurd. Wherefore, &c.

Sed adjournantur and not adjudged at this time.

In the next term adjudged that the proviso was not good, and that the issue could not have it for the forfeiture. 1 Coke, 86 [*Corbet's Case, ante* —].

Alternative Remainders in Fee.

LODDINGTON v. KIME, in Common Bench, Mich., 6 W. & M.—A. D. 1695. —1 Salk. *224, 3 Lev. 431, 1 Ld. Raym. 203, 5 Gray P. Cas. 54. From Salk.

In replevin a special verdict was found, viz: That Sir Michael Armin, being seised in fee, devised a rent charge, and then devised the land to A for life, without impeachment for waste, and in case he have any issue male, then to such issue male and his heirs forever; and if he die without issue male, then to B and his heirs forever. A entered and suffered a common recovery, and died without issue.

1. Question was whether A was tenant in tail by his devise? POWELL, J., held the express estate for life not destroyed by the implication that arose on the latter words following, so that A was only tenant for life, and the rather, because these words viz. *impeachment of waste,* and *for life,* must in that case be rejected, *quod Treby, C. J., concessit.*

2. The court held that issue was to be taken here as *nomen singulare,* because the inheritance was annexed and limited to the word issue; so that the inheritance was in the issue, and not in A, the father.

3. That this limitation to the issue was not an executory devise, being after a freehold, but a contingent remainder, so that a posthumous son could never take.

4. That the remainder limited to the issue of A was a contingent remainder in fee, and that the remainder to B was a fee also; but those fees are not like one fee mounted on another nor contrary to one another, but two concurrent contingencies, of which either is to start according as it happens; so that these are remainders contemporary and not expectant one after another.

5. The court held that the remainder in fee to B was not vested, because the precedent limitation to the issue of A was a contingent fee; and they took this difference, viz: where the mesne estates limited are for life or in tail, the last remainder may, if it be to a person *in esse,* vest; but no remainder limited after a limitation in fee can be vested.

6. That the recovery suffered by A had barred the estate limited to his issue, that being contingent, and likewise the remainder limited to B and his heirs, because that was contingent, not vested, and now never could vest; and that A had gained a tortuous fee, which would be good against B and his heirs, and likewise against all persons but the right heirs of the devisor.

This case is cited in Hennessey v. Patterson, 85 N. Y. 91, Finch R. P. Cas. 868, recognizing that alternative limitations in fee are remainders.

DOE D. HERBERT v. SELBY, in B. R., Easter, 1824.—2 Barn. & Cres. (9 E. C. L.) 926, 5 Gray's P. Cas. 1.

Ejectment for houses and lands in Middlesex county. Plea, general issue. A verdict was found for plaintiff, subject to the opinion of the court, as follows: Thomas Herbert, being seised of the lands in fee, made his will duly executed, devising the lands to his son George "during the term of his natural life; and from and after his decease, I give and devise the same estates unto all and every the child and children of my said son George and their heirs for ever, to hold as tenants in common. But if my son George should die without issue, or leaving issue and such child or children should die before attaining the age of twenty-one years, or without lawful issue; then I give and devise the same estates unto my son Thomas, my daughter Ann, my son-in-law William Duke, and their heirs for ever, to hold as tenants in common." After the death of the testator, George suffered a common recovery to his own use, conveyed the land to the defendant in fee, and died without having had issue. The plaintiff is the lessee of the said Thomas, Ann, and William, claiming under the gift over.

Chitty for the plaintiff. It will be contended on the other side that the ultimate remainder was contingent, and therefore defeated by the destruction of the particular estate. But that is not so, for either the estate given to G.'s children was an estate tail, in which case the ultimate remainder would be vested, or it was a contingent fee determinable, and the limitation over must take effect as an executory devise, according to *Gulliver* v. *Wickett,* 1 Wils. 105. In either case the destruction

of the particular estate would not destroy the remainder. 1. Even if G. had died leaving a child, who had died under age without issue, the devise over would take effect; it could not therefore be a contingent remainder, but must be an executory devise: *Pells* v. *Brown,* Cro. 590 [post p. 242]. *Doe* v. *Webber,* 1 B. & A. 713. 2 George's children would take an estate tail, for the gift over is on their death without issue, which reduces their interest to an estate tail. Besides the ultimate remainder is to persons who would be heirs general to the children, so they would never die without heirs as long as those persons lived. This case is therefore different from *Loddington* v. *Kime,* 3 Lev. 431 [ante p.]; and *Goodright* v. *Dunham,* 1 Doug. 264. (Bailey, J. But here you must read the devise, "if the children should die before twenty-one *and* without issue," otherwise the remainder over will be too remote.)

BAILEY, J. * * * It is not contended that George took an estate tail; and, indeed, *Goodright* v. *Dunham,* 1 Doug. 264, clearly shows that he took for life only, and that the children would take as purchasers by way of remainder, and they would take in fee. It has been contended that the ultimate devisees took either by way of executory devise or vested remainder. But it is clear that where a devise may operate as a contingent remainder, it cannot be considered as an executory devise. If a fee be given by way of vested limitation, but determinable, a remainder after that must be an executory devise; but if a fee is limited in contingency, and upon failure of that the estate is given over, that is a contingency in a double aspect; and if the estate vests in the one, it cannot in the other: *Loddington* v. *Kime,* 3 Lev. 421 [ante p.]. But it may happen, that an estate may be devised over in either of two events; and that in one event the devise may operate as a contingent remainder, in the other as an executory devise. Thus if George had left a child, a determinable fee would have vested in that child, and then the devise over could only have operated as an executory devise. But George having died without having had a child, the first fee never vested, and the remainder over continued a contingent remainder. *Gulliver* v. *Wickett,* 1 Wil. 105, was clearly a case of executory devise. The estate was given to testator's wife for life, and after her death to such child as she was then supposed to be *enceinte* with, and to the heirs of such child forever, provided, that if such child shall die before twenty-one, leaving no issue of its body, then the reversion over. The description of the child there was a clear *designato personæ,* and as a child *in ventre sa mere,* is for many purposes considered as *in esse,* the first remainder, a fee determinable was vested in that child, and the remainder over could only operate by way of executory devise. The other cases which I have mentioned are not in substance distinguishable from this. *Doe* v. *Burnsell,* 6 Term 30, was a devise to Mary Owstwhick, and the issue of her body, as tenants in common; but in default of such issue, or being such, if they should all die under

twenty-one, and without leaving any lawful issue of their bodies, then over. Mary Owstwhick suffered a recovery, and died without having any issue, and it was held that all the limitations subsequent to that to her were contingent, and destroyed by the recovery. No question was raised as to ultimate remainder operating by way of executory devise, but that could not be raised, as Mary Owstwhick never had any issue in whom the first remainder might vest. But *Crump d. Wooley* v. *Norwood,* 7 Taunton 362, is on all fours with the present case. There the devise was to the testator's wife for life, if she should so long remain unmarried, and immediately after her decease or marriage, to testator's three nephews, share and share alike, for life, as tenants in common, remainder to the heirs of their bodies respectively in fee; if more than one, then to all equally, as tenants in common; "and if any of his said nephews should die leaving no such issue, or leaving any such, they should all die without attaining the age of twenty-one years, then over;" and it was held that the remainders subsequent to the devise to the nephews were contingent, and defeated by the destruction of the particular estate. And one of the nephews having died without having had issue, Gibbs, C. J., considered that in that event the question of executory devise did not arise; although if there had been issue, the ultimate devise over might have operated in that mode. These authorities satisfy me, that in the event which has happened, the devise to the lessors of the plaintiff in this case did not operate by way of executory devise. It has been argued, that it might operate as a vested remainder, for that the devise to George's children was only of an estate tail, because they could never die without heirs as long as the lessors of the plaintiff lived, and therefore, "heirs" must mean "heirs of the body." But although it may be so where, after a devise to a man and his heirs the estate is devised over simpliciter to a collateral heir, yet it is not so where the limitation over depends upon the party dying within a limited time. Upon the whole, I am of opinion that George Herbert took an estate for life only, and that his children, if there had been any, would have taken a fee; but in the event of there not being any, which is the event that has happened, the remainder over was given by way of contingent remainder, and was defeated by the destruction of the particular estate. Our judgment must therefore be for the defendant.

HOLROYD, J. Under the will in question, George took an estate for life, and his children in fee. In the event of his having no children, the devise over would operate as a contingent remainder; but if he had children, then it could only take effect as an executory devise. That it was not an executory devise, in the event that has happened, is clearly proved by the cases which my brother Bailey has cited; and the language of Gibbs, C. J., in *Crump* v. *Norwood,* is peculiarly applicable. Here the estate is given over on either of two contingencies, one of them George's dying without children; that has happened, and upon that the re-

mainder over would, if at all, take effect as a contingent remainder. But the particular estate having been previously destroyed, the contingent remainder was thereby defeated.

LITTLEDALE, J. The principles applicable to this case were fully considered in *Crump* v. *Norwood,* which cannot be distinguished from it. *Doe* v. *Burnsell* is also in point. It is true, that in that case the words were, "if all such issue should die under twenty-one *and* without issue;" but here the word *or* must be read *and;* and although the point of the executory devise was not there agitated yet Gibbs, C. J., thought it an express authority for his judgment in *Crump* v. *Norwood,* where it was raised. Upon these authorities it seems to me clear that the lessors of the plaintiff cannot recover. *Judgment for defendant.*

WADDELL v. RATTEW, in Pa. Sup. Ct., April 16, 1835.—5 Rawle 231, 2 Shars. & B. 316, Finch R. P. Cas. 932.

Action by Maris Waddell, claiming as a grand-child and heir of Mary (daughter of testator), against John and Eleanor (son and daughter of testator's son John) to recover land in Middleton Tp., Montgomery county. From judgment for defendants plaintiff bring error.

John Rattew, being seised in fee, devised the land in question to his son Aaron "during the term of his natural life, and if he shall hereafter have issue of his body lawfully begotten, then to hold to him and his heirs and assigns forever; but in case he shall die without leaving such issue, then I give and devise the same to all the rest of my children, their heirs and assigns forever, as tenants in common." After testator's death Aaron suffered a common recovery and died without issue.

KENNEDY, J. * * * The plaintiff's counsel contend that Aaron took under the will a contingent fee, determinable upon his dying without issue living at his death, and that the limitation over in that event to the testator's other children, must therefore be considered an executory devise, and consequently not affected by the common recovery suffered by Aaron; or in other words, they allege that Aaron, according to the terms of the will, in case he had had issue, would thereupon have become immediately vested with a fee-simple estate in the land devised to him, defeasible however upon his dying without issue living at the time of his death—that the birth of issue would have instantly determined his life estate, by enlarging it into a fee; and again in the event of his surviving such issue, and dying without any living at the time of his death, the ulterior devise to the other children of the testator, could only have operated as an executory devise; because as a contingent remainder it could not take effect after a determinable fee had become vested in Aaron. I must confess that this view of the devise in question, when first presented by counsel for the plaintiff, struck me forcibly as having something in it; and it was certainly maintained on their part with great ingenuity. And if Aaron had not suffered the common recovery and had had issue who had died during his life, and he had then died himself without

any living at the time of his death, it may possibly be that the ulterior devise of the land to the other children of the testator, would have operated and taken effect as an executory devise; for it has been said, that an estate may be devised over in either of two events, so that in one event the devise may operate as a contingent remainder, and in the other as an executory devise. *Doe d. Herbert* v. *Selby,* 2 Barn & Cress. (9 E. C. L.) 926. Be that however as it may, the event which has occurred in this case, does not render it necessary to decide it under such aspect; but if it did, I see no objection that could be made to it, unless it might possibly be thought by some, that to adopt such a principle, would be intrenching upon a rule that has been said to prevail without even an exception to it; which is, that when a devise is capable *according to the state of the objects at the death of the testator,* of takeffect as a remainder, it shall not be construed to be an executory devise. *Reeve* v. *Long, Carth.* 310 [*post* —]; *Purefoy* v. *Rogers,* 2 Saund. 380, and cases cited in note 9. Besides this, there is said to be another rule by which an executory devise is distinguishable from a contingent remainder, which seems to be opposed to the construction contended for by the plaintiff's counsel; it is this: that to constitute an ulterior limitation an executory devise, where there is a prior estate of freehold devised, the latter must not be merely *liable* to be determined before the former shall take effect, which only renders the remainder dependent on it contingent, but it must be determined before the taking effect of the ulterior devise; as in the case of a devise to A for life, and after his decease to the unborn children of B, this would be a contingent remainder in such children; but under a devise to A for life, and after his decease *and one day,* to the children of B, the children of B in this case would take an executory devise. 2. Pow. on Dev. by Jarman 238. And for the day undisposed of between the death of A and the time fixed for the ulterior devise to the children of B to take effect, the estate would belong to the heir or residuary devisee. Id.; *Stephens* v. *Stephens,* Cas. temp. Talbot 238. Now it is obvious in the case under consideration, that the prior estate devised to Aaron for life, could not be said to be necessarily determinable before the time at which the ulterior limitation over to the other children of the testator was to take effect; it was at most, even upon the construction contended for by the counsel of the plaintiff only liable to be determined before that event might happen; and hence according to the rule just mentioned cannot, or at least in the event that has occurred, cannot be considered an executory devise, but must be deemed a contingent remainder. This construction seems to be requisite, also, for the purpose of carrying into effect an intention pretty plainly manifested by the testator, that Aaron should not have it in his power to dispose of the land beyond the period of his own life; so that by construing the prior devise to Aaron, for the term of his natural life, an absolute vested estate in him for life, making it neither more nor less, with a contingent remainder to him in fee upon

his dying, leaving issue living at the time of his death; we give full effect to the letter of the will as well as the intent of the testator.

If the fee given to Aaron, which is admitted to be determinable, had vested in him during his life, the limitation over to the other children of the testator could only have taken effect as an executory devise, but being ever in contingency, and the event having failed upon which it is claimed by the counsel for the plaintiff, that it would have become vested, the ulterior devise of the land to the other children had all the properties of a contingent remainder, and as such might and would have taken effect, if the recovery had not been suffered, and therefore could not have operated as an executory devise. The devise to the other children of the testator, is not then the case of a limitation over to them, after a prior vested determinable fee given to Aaron, which would make it an executory devise, but it is one of two several fees, limited merely as substitutes or alternatives, one for the other, that is the first to Aaron, if he should die leaving issue living at the time of his death, but if not, then to the other children of the testator in lieu thereof; thus substituting the latter in the room of the former, if it should fail of effect. This is the principle which was decided in *Luddington* v. *Kime,* 3 Lev. 431, 1 Ld. Raym. 208, where it was held that the first remainder was a contingent remainder in fee to the issue of A and the remainder to B was also a contingent fee, not contrary to, or in any degree derogatory from the effect of the former, but by way of substitution for it. And this sort of alternative limitation was termed a contingency with a double aspect. Fearne on Cont. Rem. 373. So if the estate vested in the one, it never could in the other. *Doe d. Herbert* v. *Selby,* 2 Barn & Cress. (9 E. C. L.) 926, [ante p. 191]. The ulterior devise then to the other children of the testator, being considered in the event that has taken place, a contingent remainder, and Aaron, by suffering a common recovery, having determined his life estate, the only prop of the remainder, before it became vested, it fell, and never could take effect afterwards. The plaintiffs therefore have no right to recover the land, and the judgment is affirmed.

A devise to A for life and after his death to such of his children as shall then be living, but if he leave no children him surviving, then to G and others and their heirs, was held to give G and his companions a contingent remainder, not an executory devise, because this and the prior limitation are in the alternative, and nothing could vest in any but children surviving A. This was declared in a suit to determine the power of G and his companions to sell during A's life. Their interest or possibility was held assignable. Watson v. Smith (1892), 110 N. Car. 6, 14 S. W. 640, 28 Am. St. Rep. 665.

Limited on Remote Possibility.

ANON., 40 Edw. 3.—A. D. 1367.—Brooke Abr. t. Done & Rem. 6, Yearbooks 40 Edw. 3, 9.

There were father and two sons. The father levied a fine to N *sur grant & render* to the father for life, remainder to the eldest son and his wife in tail, remainder to the right heirs of the father; the father died, and afterward the tenant in tail and his wife died without issue, the younger son entered, and the lord avowed on him for relief as heir of the elder brother to the remainder in fee, and had return by judgment notwithstanding that the younger son would have to be adjudged in as a purchaser by the name of right heir of the father, because by his acceptance the fee and the estate tail might not be at the same time in the elder son; which would seem contradictory, for he may have in him the possession and the other be in abeyance, and this may be given and forfeited; and it is said that where a gift is made to N for life the remainder to the right heir of J who is living, the remainder is in suspense or abeyance during the life of J, and from this it was said that if J die during the life of N the remainder is good, but if J survive N the remainder is void, because there is nothing to sustain it so.

CHOLMLEY'S CASE, in the Exchequer, 39 Eliz.—A. D. 1597.—2 Coke 50, Moor 342, 2 Roll Rep. 60. Abridged from 2 Coke 50.

Trespass *quare clausum* by Hugh Cholmley against Randall Hanmer and others. Plea not guilty. It was found by special verdict, that: Thomas Holford, being seized of the land in question, and having two sons (Christopher and George), said Thomas, Jane his wife, and Christopher the elder son, levied a fine of the land to John Warren and T. Stanley, to the use of Thomas for life, then to the use of Christopher and the heirs male of his body, then to the use of George and the heirs male of his body, then to the use of the right heirs of Thomas. Later Thomas died, and still later George, by indenture duly enrolled, bargained and sold all his right, title, and interest in the tenements to John Warren, to have to said John's use during the life of Christopher, remainder to the queen her heirs and successors forever, upon condition that the estate should be void upon tender of 20£. to Warren, or to the queen. Later Christopher enfeoffed the land to several and their heirs, and later a common recovery was had against them, who vouched Christopher to warranty, who vouched the common vouchee, and execution was had accordingly, which was to the use of Christopher and his heirs. Afterwards George paid 20£. to Warren, who received it. Afterwards the queen, reciting the grant by George to Warren remainder to her and that the remainder to her was by fraud, of her own motion granted it to Christopher in fee. Later George bargained and sold the tenements to John Bruin, by indenture duly inrolled, to have and hold for the life of Christopher, remainder to the queen on condition to cease on tender of 30*s.*, to which grant Bruin agreed. Later

another recovery was suffered with double voucher, in which Christopher was again vouched; which recovery was to the use of Christopher and his heirs. Later Christopher died without issue male. His daughter Mary had married the plaintiff, who claims in her right. George paid the 30*s.* to Bruin according to the condition, which was found by inquisition by virtue of a commission under the great seal of England; and upon showing his right, it was awarded that the queen's claim be released. Thereupon defendants entered by command of George, and plaintiff brought trespass. Whether the entry was lawful was the question.

Opinion of the Court. And after many arguments at the bar, case was argued at the bench by EWEN and CLARK, BB., and PERIAM, C. B., and it was unanimously agreed by them, that the entry of George Holford was not lawful; wherefore judgment was given for the plaintiff. And in this case divers points were unanimously resolved by the court:

1. That the remainder limited to the queen after the death of Christopher was void for three reasons: (A) Because Warren, who was party to the first indenture, took nothing; and by consequence the queen, who is not party to the indenture, but named by way of remainder after the *habendum,* the particular estate being void, shall take nothing; for the estate which is limited to Warren is for the life of Christopher. * * * This grant is void, because it can never take effect in possession, nor can the grantee ever have any benefit thereof. And therefore a difference was taken between such grant of a reversion and the said grant of a remainder, for the grant of a reversion during the life of a tenant in tail is good because he shall have the service which the tenant in tail ought to do during the life of the tenant in tail; but such grant of a remainder can never to any purpose take effect, and therefore it is void. Moreover, a manifest difference appears between this case at bar and a lease to Christopher for his life, the remainder to another for the life of Christopher, for by possibility the remainder may take effect; *e. g.,* if the tenant for life makes a feoffment in fee, or commits any forfeiture, he in the remainder may enter for the forfeiture; and that is proved by the book in 41 Edw. 3, Fitz. tit. *Waste* 83, and (*remanere dicitur quasi terra remanens*) that cannot be when a remainder cannot by any possibility fall into possession; for a remainder ought to vest in estate during the particular estate, and ought to take effect in possession when the particular estate ends, for vain is the possibility that may not in any way come into action.

It was objected that Christopher might enter into religion, and then might Warren enter during his natural life, for as much as Christopher had no issue male. But as to that it was answered and resolved, that such possibility shall not make the remainder good, because it is such a remote possibility as shall not be intended by a common intendment to happen. A possibility which shall make a remainder good, ought to be a common possibility, and possibility proximate, as death, or death

without issue, or coverture, or the like.[1] And therefore, as the logician saith, *potentia est duplex, remota & propinqua.* [It was said in *Farington* v. *Darrel,* reported herein under Powers] 9 Hen. 6, 24b, [that] the remainder to a corporation which is not at the time of the limitation of the remainder, is void, although such be erected during the particular estate, for it is a possibility remote. And this difference plainly appears in a common case in our books: if a lease be made for life, the remainder to the right heirs of J. S., this is good; for by common possibility J. S. may die during the life of the tenant for life; but if at the time of the limitation of the remainder there is no such J. S. but during the life of the tenant for life J. S. is born and dies, his heirs shall never take, as it is agreed in [Y. B.] 2 Hen. 7, [Hilary] 13b, [pl. 16]. And in 10 Edw. 3 [45 a & b, and] 46a, the case was, that upon a fine levied to R he granted and rendered the tenements to one I and Florence his wife for their lives, the remainder to G (son of I) in tail, the remainder to the right heirs of I; and in truth at the time of the fine levied, I had not any son named G, but afterwards he had a son named G and died; and in a praecipe against Florence it was adjudged that G should not take the remainder in tail; because he was not born at the time of the fine levied, but long after; wherefore another who was right heir to I, by judgment of the court, was received; for when I had not any son named G at the time of the fine levied the law will not suppose that he will afterwards have a son named G, for that is a possibility remote. Note, reader, a difference between a re-

[1] "This rule, though professed to be founded on former precedents, is not to be found in any of the cases to which Lord Coke refers, in none of which do either of the expressions 'possibility on a possibility,' or 'double possibility,' occur. It appears to owe its origin to the mischievous scholastic logic which was then rife in our courts of law, and of which Lord Coke had so high an opinion that he deemed a knowledge of it necessary to a complete lawyer. The doctrine is indeed expressly introduced on the authority of logic—'as the logician saith, *potentia est duplex, remota et propinqua.*' This logic, so soon afterwards demolished by Lord Bacon, appears to have left behind it many traces of its existence in our law; and perhaps it would be found that some of these artificial and technical rules which have most annoyed the judges of modern times owe their origin to this antiquated system of endless distinctions without solid differences. To show how little of practical benefit could ever be derived from the distinction between a common and a double possibility, let us take one of Lord Coke's examples of each. He tells us that the chance that a man and a woman, both married to different persons, shall themselves marry one another, is but a common possibility. But the chance that a married man shall have a son named Geoffrey is stated to be a double or remote possibility. Whereas, it is evident that the latter event is at least quite as likely to happen as the former; and if the son were to get an estate from being named Geoffrey, as in the case put, there can be very little doubt but that Geoffrey would be the name given to the first son who might be born. Respect to the memory of Lord Coke has long kept on foot in our law books the rule that a possibility on a possibility is not allowed by law in the creation of contingent remainders. But the authority of this rule has long been declining, and a very learned judge, now deceased, declared plainly that it was abolished" (referring to Lord St. Leonards). Williams on Real Property. (18th Am. ed.), 420-421.

mainder limited by a particular name, and by a general name; for a remainder limited by general name may be good, although the person be not in being at the time of the remainder limited; as if a lease for life be made, the remainder to the right heirs of J. S., who is alive, this remainder may be good, and yet he has no heir at the time of the remainder limited.[2] The same law of a remainder to the first born son. But a remainder limited in particular by name of baptism and sir name is not good if the person be not in being. It is held in 7 Edw. 3 that if the advowson of the church of D. be granted to the parson of D. and his successors, it is void to the successor, because the successor who ought to take it can never be benefited by way of presentation.

(B.) The second reason why the remainder to the queen is void was because the law will never adjudge a grant good by reason of a possibility or expectation of a thing which is against law, for that is a possibility remote and vain, which by intendment of law never can happen.

(C.) The remainder to the queen is void, because George, having a remainder in tail, hath granted all his estate to Warren, *habendum* all his estate during the life of Christopher, the remainder to the queen, in which case, when he hath granted all his estate to Warren, he cannot limit any remainder thereof to the queen; for a remainder is but a remnant of the estate of the grantor, and the queen cannot have any remnant of the estate of George, when he having an estate in tail has granted all his estate to Warren. And *Littleton,* §649, saith that in such case the estate tail is in abeyance. And 19 Hen. 6, 60a, it is said that if tenant in tail be attainted of felony, and the king after office found seized, the estate tail is in suspense. And see 13 Hen. 7, 10a, if there be tenant for life, the remainder in tail, if he in remainder in tail release to tenant for life all his right, it puts the estate tail so in abeyance that no right remains in him who releases to have an action of waste; for in the same case, by his release, he hath put all his estate out of him. It was agreed, Hilary 35 Eliz., in *Blitheman's Case* [Cro. Eliz. 280, 1 And. 291], that if tenant in tail in consideration of parental love, covenants by deed to stand seised to the use of himself for his own life and after his death to the use of his eldest son in tail, and after this covenant the covenantor marries and dies, the wife shall be endowed; for when tenant in tail hath limited the use to himself for the term of his own life, he cannot limit any remainder over; for an estate for his own life is as long as he can limit by the law, and therefore the limitation of the remainder is void. Wherefore it was concluded, that upon consideration of the first point Warren had nothing. And upon consideration of this latter point, if he should take entirely he would take too much, and by consequence the remainder to the queen is void which-

[2] "The true ground of the decision in the old case (10 Edw. III, 45), to which Lord Coke refers, was, no doubt, as suggested by Mr. Preston (1 Preston Abst. 128), that the gift was made to Geoffrey the son as though he were living when in fact there was then no such person." Williams on Real Property (18th Am. ed.), 421, note g.

ever way decided. And it was agreed that the limitation to Warren by the *habendum* for the life of Christopher was void and repugnant.

2. Admitting the remainder to the queen was good, yet it was resolved that the common recovery did bar the estate of Warren, and by consequence the condition also during his life. * * * It was resolved that the recovery doth bar not only the estate tail, but also the estate for life of Warren, although the remainder of the fee was in the queen; for it is out of the statute 34 & 35 Hen. 8, c. 20, because the estate tail was not of the queen's gift, nor any of her ancestors, kings of England, as it hath been adjudged. [*Jackson* v. *Drury,* Moor 115, 3 Leon. 37; *Wiseman's Case,* 2 Coke 15, Moor 195, 1 And. 140.] * * *

This payment to Warren cannot devest the remainder out of the queen for three reasons: 1, because the condition during the life of Warren was discharged; 2 because he who takes benefit of a condition ought to have the whole estate given revested in him as in his first estate, and that cannot be here for the estate for the life of Warren was barred by the recovery; also, 3, the tender to Warren was to the intent to revest his estate, and that cannot be when his estate was barred, and cannot be revested: for which cause this payment cannot devest the remainder out of the queen. * * *

Statute of New York, Mich., &c. "No future estate, otherwise valid, shall be void on the ground of the probability or improbability of the contingency on which it is limited to take effect." **N. Y.** R. S. (1828), pt. 2, c. 1, t. 2, Art. 1, § 26; **Mich.** R. S. (1846), c. 62, § 26, C. L. (1897), § 8808; **Minn.** St. (1866), c. 45, § 26, R. L. (1905), § 3215; **Wis.** R. S. (1849), c. 56, § 26, St. (1898), § 2050.

Sufficient Particular Estate to Support.

NOTE BY DYER AND MANWOOD, JJ., in Common Pleas, Mich. 19 Eliz. —A. D. 1587.—4 Leonard 21, Cas. 67.

A leaseth to B for years, the remainder to the right heirs of the said B, and makes livery. The remainder is void, because there is not any person *in esse* who can take presently. But where a lease is made to B for life, the remainder to his right heirs, there he hath a fee executed; and it shall not be in abeyance, for there he takes the freehold by the livery.

GOODRIGHT v. CORNISH, in King's Bench, Hilary term, 5 Wm. & Mary, A. D. 1694—1 Salkeld 226; s. c. 1 L. Raym. 3, 4 Mod. 255.

In ejectment a special verdict was found, viz.: Knowling had issue two sons, John and Richard, and devised lands to John for 50 years if he should so long live, "and as for my inheritance after the said term, I devise the same to the heirs male of the body of John, and for default of such issue, then to Richard." THE COURT resolved: 1st. That John had not an estate tail by implication upon the words "without issue," because the devisor had given him an estate for years by express words,

and the court cannot make such a construction against express words, when thereby they would also drown the estate for years and make an estate of inheritance. 2dly. The court held this devise to the heirs male of the body of John to be void in its creation; for, for want of an estate of freehold to support it, it was void as a remainder; and they seemed not to think it an executory devise, because it was limited as a remainder, and because it is limited *per verba de praesenti*. If one devise his estate to the heir of J. S. and J. S. is living, the devise shall not be construed an executory devise, and such a devise is therefore void; but if it were to the heir of J. S. after the death of J. S., that is good as an executory devise. So note the diversity *inter verba de præsenti & verba de futuro*. 3rdly. The court held the limitation to the heirs male of John was become void by event, whatever it was in its creation, because John is now dead without issue. 4thly. The court held that if the remainder to the heirs male of John was void in point of limitation, then the next remainder limited to Richard took effect presently.

Statute of New York. "A remainder of a freehold or chattel real, either contingent or vested, may be created expectant on the determination of a term of years." N. Y. R. S. (1828), pt. 2, c. 1, t. 2, Art. 1, § 24.

Destruction of Contingent Remainders by Discontinuance or Failure of Particular Estates.

EARL OF BEDFORD'S CASE, in Court of Wards, Hartford Term, 34 & 35 Eliz., A. D. 1593.—Abridged from Moore 718. s. c. 2 And. 197.

Francis, Earl of Bedford, having four sons, Edw., John, Francis and William, and being seised of lordships in fee, enfeoffed them to several for the use of himself for 40 years, then to the use of John and the heirs male of his body, and for want of such to the use of the right heirs of the said earl forever. Later Edw. died without issue and later John died without issue male, leaving issue Elizabeth and Anne; after which the earl by deed indented, to provide jointure for his wife and to advance his heirs of his body, covenated with several that from thenceforth he and his heirs should stand seised of the lands, &c., to the use of himself for life, then to the use of his son Francis and the heirs male of his body, with remainders over. Afterwards Francis the son died leaving his son Edward surviving, and shortly afterwards Francis the earl died. The question was whether said Edward now Earl of Bedford as heir of his father ought to have the lands by virtue of the indenture last mentioned, or whether the daughters of John ought to have them by force of the feoffment first made, as heirs of Francis, by purchase, or otherwise.

The case was argued openly before WRAY and ANDERSON, chief justices, and the master and counsel of the court, by *Popham* for the daughters, and by *Egerton* for the heir male. The case by order of the court was divided into points; and the counsel on one side made objections on these points, and the other made response in writing, that the

court might see the difference. The objections and responses were as follows:

1. We object that the earl over-living John Lord Russell his son, who died without issue male, in the life of the earl, the remainder limited to the right heir of the earl is void, for that the earl could not have an heir in his lifetime, and every remainder must depend upon a particular estate, and vest during the particular estate; as if a man make an estate in tail, remainder to the right heirs of J. S., and the tenant in tail die living J. S. the remainder is void, for that J. S. cannot have an heir during his life, and the remainder cannot vest during the estate in tail. The answer was: We agree the law to be so in feoffments and gifts executed in possession, and the reason for that there is no person able to take the freehold in the mean time, and the freehold in that case cannot be in abeyance or in no person, for then no stranger that hath any right in the land can have any praecipe, or recover the land if the freehold should be in no person. But in the case of feoffees to uses the use may be in abeyance in no person for a time, for the feoffees in the mean time are persons able to hold the land, and are liable to every man's praecipe, and no mischief at all. And this agreeth with the common practice and experience, for who doth not upon establishment of his lands limit uses to his first, second, third, sons, &c., albeit he hath none at that time, for the feoffees are persons able to hold the land to a future use.

2. We object, that if the earl had limited an estate for life to himself, the remainder in tail, the remainder to his right heirs, the remainder had been executed in him. The response was: We agree this, for it is a principle of law, that wheresoever the ancestor takes an estate for life, or any estate of freehold in any conveyance, and after in the same conveyance an estate is limited to his right heirs, the law will conjoin the estates in the ancestor, for the ancestor and his heirs be correlative; but otherwise it is where the ancestor takes but an estate for years; and therefore if a lease be made to A for years, remainder to B in tail, remainder to the right heirs of A, the right heir of A shall be a purchaser without question, and the remainder doth not vest in A.

Lastly, we object that if a man maketh a lease for years, the remainder in tail, the remainder to the right heirs of the lessor, the remainder is void; for a man cannot limit a remainder to his right heirs; no more in the case at bar. The response was: True it is that in acts executed in possession a man cannot limit a remainder to his right heirs, for the law prefers the descent before the remainder. No more can a man by any conveyance in possession limit a remainder to himself; and therefore, if A maketh a lease for life, the remainder in tail, the remainder to A himself in tail or in fee, or the remainder to the right heirs of A, the remainder is void; for no more than he can limit a remainder to himself, no more can he limit it to his heirs, for the son is part of the parent. But otherwise it is in case of uses, for without question a man may make a

feoffment to the use of A for life, and after to the use of B in tail, and after to the use of the feoffor himself in fee, or in tail, or for life, &c., and by consequence to his heirs.

On which matters and more, arguments were made at the Hartford term with all the justices of England; and the case was argued again before them by serjeant *Glanville* and by *Coke*. And afterwards it was resolved by the greater part of them, and so ruled and decreed, that the use limited to the right heirs by the earl was the old use and not a new use; also, that the death of John Russell without heir male had so determined the particular freehold on which the remainder to his right heirs depended, that the remainder by this reverted to the donor. And by this the now earl held the land.

"What operation the statute [27 Henry VII, c. 10] had upon contingent uses has been the subject of much judicial controversy, and demands our particular attention. Perhaps no question ever occurred on which the judges were so divided in opinion; some held that the estate vested in the first *cestuy que use*, but subject to the contingent uses which should be executed out of his seizin as they arose; * * * others held that the seizin to serve them was, to use their own expressions, *in nubibus*, *in mare*, *in terra*, or *in custodia legis;* and they also seem to have been of opinion that contingent uses could not be barred. Again, some thought that the trustees were merely pipes through whom the estate was conveyed to the uses as they arose, while others thought that so much of the inheritance as was limited to the contingent uses remained actually vested in the feoffees till the uses arose." Sugden on Powers, 12, 13.

"The establishment of shifting and contingent uses occasioned great difficulties to the early lawyers, in consequence of the supposed necessity that there should, at the time of the happening of the contingency on which the use was to shift, be some person seized to the use then intended to take effect. * * * But this doctrine, though strenuously maintained in theory, was never attended to in practice. And in modern times the opinion contended for by Lord St. Leonards [Mr. Sugden] was generally adopted, that in fact no *scintilla* whatever remained in B [the feoffee to uses], but that he was, by force of the statute, immediately divested of all estate, and that the uses thenceforward took effect as legal estates according to their limitations, by relation to the original siezin momentarily vested in B." Williams on Real Property (18th Am. ed.), 437.

CHUDLEIGH'S CASE, or DILLON v. FREINE, argued in the Exchequer Chamber before all the judges of England, Hilary, 36 Eliz., A. D. 1594—1 Coke 120-140b, s. c., 1 And. 309, Popham 70. Reported according to Coke.

Statement of facts and argument of counsel are abridged.

Trespass *quare clausum* by William Dillon against John Freine in king's bench. Plea not guilty. It was found by special verdict, that Richard Chudleigh, seised in fee of the place where the trespass is alleged to have been committed, had issue four sons: Christopher his oldest, Thomas second, Oliver third, and Nicholas. Being so seised, the father enfeoffed the manor by indenture to several persons and their heirs, to the use of the said Richard and the heirs of his body on certain persons named and in default of such issue to the use and performance of his will for ten years after his death and then to the use of the feoffees during

the life of Christopher, and then to the first son of Christopher in tail, and so on to the tenth, then to the use of Thomas in tail, then to the use of Oliver in tail, then to the use of Nicholas in tail, and finally to the use of the feoffor's heirs. The feoffor died, and then, before any issue born to Christopher, the feoffees enfeoffed him, having notice of the former uses. Afterwards Christopher had issue John, under whom defendant claims. The question was whether the uses which before were in contingency, should vest in the son of Christopher, and be executed by the statute of uses, 27 Hen. 8, c. 10. In this case the point is no other, but whether these contingent uses before their essense by the said feoffment of the feoffees be destroyed and subverted, so that they shall never rise out of the estate of the feoffees after the birth of the issues.

And this case was argued many times at the bar in the king's bench on both sides; and because the case was difficult and of great consequence and importance, it was thought necessary that all the justices of England should openly, in the Exchequer Chamber upon solemn argument, show their opinion in this case. And afterwards, Hilary term, 36 Eliz., the case was argued in the Exchequer Chamber before all the justices of England, by *Hugh Wiat, ex parte Querent'* [for the plaintiff], and by *Coke, the queen's solicitor general, ex parte defend'* [for the defendant]. And after in Easter term following, by *Rob. Atkinson,* for the plaintiff, and by *Francis Bacon* for the defendant; but I did not hear their arguments. And yet it is necessary to report what matters were moved at the bar, to the intent the state of the question should be better understood, and the arguments and reasons of the judges at the bench better apprehended.

[Argument by Coke for the defendant]: For the argument of the principal point, four things are to be considered: 1. What an use is, and the several natures of uses, and of what esteem and account all manner of uses are in judgment of law. 2. If contingent uses (as well as uses *in esse*) might have been discontinued or tolled at the common law before the statute of 27 Hen. 8, c. 10. 3. If our contingent use had been discontinued or destroyed, if the said statute of 27 Hen. 8 had not been made, inasmuch as the feoffee had notice of the uses. 4. If the said statute of 27 Hen. 8 preserves any contingent use, which had been destroyed by the common law, and in that to consider the mischiefs which were before the said act, and the remedy which the makers of the act have provided by the purview thereof.

What an use is, and the several natures of uses, and of what estimation all uses are in law. An use is a trust or confidence which is not issuing out of land, but as a thing collateral annexed in privity to the estate, and to the person, touching the land, *scil.*, that *cestuy que use* shall take the profits, and that the tertenant shall make estates according to his direction. So that, he who hath an use hath not *jus neque in re, neque ad rem,* but only a confidence and trust, for which he hath no remedy by the common law, but his remedy was only by *subpoena* in chancery. If the feoffees would not perform the order of chancery, then their persons for the breach of the confidence were to be imprisoned till they did perform it; and therefore the case of an use is not like unto commons, rents, conditions, &c., which are hereditaments in judgment of law, and which cannot be taken away or discontinued by the alienation of the tertenant, or by disseisins, or by escheats, &c., as uses may, as shall after be said. There were two inventors

of uses, fear and fraud: fear in times of troubles and civil wars, to save their inheritances from being forfeited; and fraud to defeat due debts, lawful actions, wards, escheats, mortmains, &c. There are two manners of uses: 1, *In esse*—in possession, reversion, remainder; 2, in contingency, which by possibility may fall into possession, reversion, or remainder. To every of these uses there are two inseparable incidents, confidence in the person, and privity in estate, as appears in [Y. B.] 14 Hen. 8, 6a. And this confidence in the person is either expressed by the party, or implied by the law; and so in privity in estate either expressed or implied, as shall be after shewed. These uses and confidences to some respect were reputed as chattels, and therefore were devisable; and to other respects they were esteemed as hereditaments of which there should be *possessio fratris* [*i.* e., by descent to a brother], &c., as [Y. B.] 5 Edw. 4, 7b, is; but yet in law, neither chattel, nor hereditament, for they were not assets to executors, nor assets to the heir.

2. Whether a contingent use might be discontinued before the statute: And it seems clearly, that before the statute, uses in contingency might have been taken away and destroyed as well as uses *in esse*. And therefore if there be feoffee at the common law to the use of me for life, and after to the use of him who shall be my first son in tail, &c., and such feoffee before the birth of my son had been disseised or made a feoffment upon good consideration to him who had no notice of the use; the contingent use in the one case was suspended, and in the other case utterly destroyed. For if uses *in esse* which were of greater value and estimation than uses in contingency (which were but possibilities of an use) might be discontinued or destroyed as above, as the books are (24 Hen. 8 [Brooke's Abr.], *Feoffment al uses* [40]; [Y. B.] 14 Hen. 8, 6, 7, 24; & [Y. B.] 28 Hen. 8, fol. 8, 9, 10), *a multo fortiori uses* in contingency and future might be discontinued and taken away. Also a contingent use was but a trust and confidence; and therefore, if confidence in the person or privity in estate fail, the use was also either suspended or destroyed; and therefore without question a feoffee upon good consideration, without notice, disseisor, or lord by escheat, lord of a villain, corporation, an alien born, [or] a person attainted, shall not stand seised to a contingent use, no more than to an use *in esse* before the statute of 27 Hen. 8. And therefore it is agreed in [Y. B.] 33 Hen. 6, 14b, and 31 Edw. 3 [Fitzherbert's Abr.], *tit. Collusion* 29, if the father makes a feoffment to his eldest son upon collusion, now by the statute of *Marlebridge* the lord had a possibility to have the ward, if the father died, his heir within age, but if the feoffee made a feoffment over *bona fide*, and afterwards the father died, his son within age, there that possibility was destroyed, because the stranger who had no notice hath gotten the land *bona fide*. So if A grants a reversion or seigniory to B now he hath a possibility to have the seigniory or reversion; but if A grants the reversion or seigniory to another and he gets attornment, now the first possibility to B is destroyed, as *Littleton* saith, fol. 126a; but more shall be said to this point after, in answer to certain objections of the other side. And although in our case the feoffee had notice, yet because he was in of another estate, so that the privity of estate failed, for that reason he shall not stand seised to the use, for the use is a confidence annexed in privity to the estate of the land. And therefore there is a difference between things annexed in privity to the estate of the land, and things annexed to the possession of the land without respect of any privity: And therefore disseisor, abator, or intruder shall not be seised to an use; although he hath notice, for the use was not annexed to the possession of the land which each of them hath, but to the privity of the estate which is denied to them all; for they are not in in privity of the estate to which the use was annexed, but in the *post*. Also forasmuch as *cestuy que use* had no remedy but in chancery, and the chancellor hath no power to determine the right of inheritances, for that reason they can stand seised to no use. * * *

So if there be privity in estate, yet if confidence either expressed or implied fail in the person, the use is suspended or destroyed; [as] if the feoffee to an use upon good consideration infeoffeth another who hath no notice, here is privity in estate, but here is no confidence in the person either expressed or implied, and therefore the use is gone. But if a feoffment be made without consideration to one who hath no notice, there is privity in estate, and the law implies notice of the trust, and therefore there the use remains, but not as a thing annexed to the land, but to the privity of the estate, 5 Edw. 4, 7b. If the husband makes a feoffment in fee of the land of his wife upon consideration, and without expressing any use, the wife shall not have the *subpœna;* for the feoffment doth disaffirm the wife's right, and the feoffee is not in privity of the estate of the wife. So in the case at bar; tenant for life, the remainder in fee to the use of another; tenant for life makes a feoffment in fee to one who hath notice; he cannot stand seised to the first use, because the use is annexed to one estate, and the feoffee is in of another estate. It is agreed in [Y. B.] 45 Edw. 3, 18b, that if donee in tail with warranty makes a lease for life, and afterwards in a *præcipe* brought against the lessee for life, he is received upon the default of the lessee, he shall not vouch by force of the warranty, for the warranty is annexed to one, and he is in of another estate, and always the warranty as to voucher requires privity of estate to which it was annexed. And the same law of an use. So it is held in 10 Eliz. Plow. Com. 351, that *cestuy que use* for life or in tail, remainder in tail, with divers remainders over in use, makes a feoffment to one who hath notice, he shall not stand seised to the first uses, *causa qua supra.* But of things annexed to land it is otherwise, as of commons, advowsons, and the like appendants or appurtenances. And therefore if tenant in tail, or the husband seised in the right of his wife, makes a feoffment of a manor or part thereof with the advowson, the advowson at least after presentment shall pass as appendant to the manor or to part of the manor (as the books are in 23 Assize 8; 34 Edw. 1 [Fitzherbert's Abr.] *Quare Impedit* 179; [Y. B.] 43 Edw. 3, 25, 26; and [Y. B.] 17 Edw. 3, 5a, 19b), and not to the estate of the land, for the estate of the land is discontinued by the feoffment. So disseisor, abator, intruder, or the lord by escheat, &c., shall have them as things annexed to the land. So note a diversity between an use or warranty, and the like things annexed to the estate of the land in privity, and commons, advowsons and other hereditaments annexed to the possession of the land.

Then, 3, forasmuch as if the statute of 27 Hen. 8 had not been made, the contingent use in the case at bar had been taken away; let us now see whether the statute of 27 Hen. 8 hath provided for the preservation and maintenance of contingent uses against the rule of law before; for if the statute doth not support the contingent use in the case at bar, without doubt the same is taken away. And therefore two things are necessary to be considered for the better discussion of this point: First, The mischiefs which were before this act, and which the makers of the act did intend to remedy, and, secondly, What manner of remedy they have provided for it; and from thence will arise the true interpretation of the letter and meaning of the act.

And for the better apprehension of the mischiefs which were before the act, certain former statutes made against the abuses of uses in particular cases (for the [this] treaty [treatise] shall be only of uses) are to be considered. And thereby the abuses of such uses will fully appear, and that fraud was the principal cause of the invention of them in subversion of law and justice. By the statute of 1 Rich. 2, c. 9, it is provided, that because disseisors make feoffments to great men and others, for maintenance, and to other men unknown, to the intent to delay or defraud the disseisees, in such cases the disseisee shall have his action against the pernor of the profits (which was *cestuy que use*), notwithstanding such feoffment by fraud and collusion within the year. The statute of 4 Hen.

4, c. 7, inlarges the statute of 1 Rich. 2 in the time and in the actions also. The statute of 11 Hen. 6, c. 4, explains it. The statute of 1 Hen. 7, c. 1, gives a formedon against *cestuy que use* who is called pernor of the profits. And by those acts it appears, that fraud and deceit to defeat him who had good title and right to the land of his lawful remedy, was the inventor of these feoffments to uses. It was provided by the statute *de religiosis*, 7 Edw. 1 [*ante* —], in enlargement of the statute of *Magna Charta*, 36, which had provided, "*quod non liceat alicui dare terram alicui domui religiosae*," that they should not acquire to them lands or tenements *ante vel ingenio*, &c., but to defraud both those laws it was invented, that a feoffment should be made to the use of religious men, or commonalties, and therefore was the statute of 15 Rich. 2, c. 5, made to remedy that fraud. By feoffment to uses, lords were defrauded of their wards, until the statute of 4 Hen. 7, c. 17. The statute of 19 Hen. 7, c. 15, recites, that men were defrauded of their executions, the lords of their reliefs and heriots, and the lords of villeins of the purchases of their villeins by feoffments to their uses, and that statute doth remedy those mischiefs. The statute of 1 Rich. 3, c. 1, which is more general than the other statutes, intends to remedy four great mischiefs by reason of secret feoffments to uses: 1, Danger to purchasers and other the king's subjects; 2, trouble; 3, costs; 4, grievous vexations. So that it was not only danger, but danger with trouble; and not danger with trouble only, but danger with trouble and costs; and not danger with trouble and costs only, but with great vexation. Also examples thereof are expressed in the preamble of the act; no purchaser of lands in perfect surety, no wife of dower, no lessee of his lease, no servant of any annuity granted to him for his service, &c.; by reason of these privy and unknown uses. This statute intended to provide for these mischiefs in establishing all feoffments, grants, &c., made by *cestuy que use*, &c. But so mischevious and sinister is the invention and continuance of uses, that they also over-reached the policy and providence of the makers of this act also: For, for example, the purchaser was not in a better case than he was before, for if the feoffor limit to himself but an estate for life or in tail, or to his wife, or to his son, &c., or if the feoffees made secret leases or estates, the purchaser could not have a sure estate, by any estate that *cestuy que use* could make, so that danger, trouble, costs, and great vexation remained in the realm by these covenous and fraudulent uses, notwithstanding the said statute of 1 Rich. 3 [c. 1].

For the remedy of which, and many other mischiefs, was the statute of 27 Hen. 8, c. 10, made for the general remedy of all mischiefs and abuses of uses, which act was divided into two general branches, viz., the preamble which expresses the mischiefs, and the body of the act which provides the remedy. [Here the statute is reviewed at length.]

So the makers of the said statute of 27 Hen. 8 did not intend to provide a remedy and reformation by the continuance or preservation, but by the extinction and extirpation of uses; and because uses were so subtle and ungovernable, as hath been said, they have with an undissoluble knot coupled and married them to the land, which of all the elements is the most ponderous and immovable. It would be then against the express intent of the makers of the act to preserve uses otherwise than they were by the common law, for they intended *sum modo* to extirpate and extinguish them. And if by any construction out of this act contingent uses should be preserved: 1, Greater inconveniences would follow than were before; 2, great absurdities would from thence likewise ensue. For: 1. Land would pass against the rule of the common law from one to another so easily, and upon such secret conditions and limitations, that no person could know in whom the estate of the land did remain. 2. Land would pass and be transferred by nuncupative will from one to another; as if a feoffment in fee be made to [the use of] such persons as he shall name by his last will, &c., he might limit the uses by will nuncupative. 3. Heirs would thereby

be disinherited; for if these perpetuities should be adjudged of force, it is impossible (if they be not wrote on the walls of their houses, and if the parties which are bound by them have not counsel learned in the law always with them) for them to observe the nice and precise points of the usual provisoes, and clauses of restraint contained in perpetuities. 4. Lords would lose their wards and the fruits of their seigniories. 5. No purchaser would be assured of his purchase, and where the statute intends to provide that the king nor none of his subjects shall be deceived by these uses; now the purchaser will be in worse case than he was before, for before the statute if he had purchased it *bona fide* without notice, as hath been said, he should not stand seised to the use; now it is said, that the land shall be bound with the use in whose hands soever it shall come, so that where the preamble says, that the subject shall not be damaged by these uses, he by such construction will be more damnified than he was before. 6. Greater mischief would follow for strangers actions than was before, for upon a secret limitation of uses the land itself would be transferred from one to the other, so that no man in the world can know in whom the estate of the land is; but before this statute, although they might change the use, yet they could not convey the land upon [without] livery, fine, or recovery; but now the land itself would pass by performance of a secret condition in his chamber. 7. No person shall be tenant by the curtesy, nor tenant in dower, for they do not know in whom the estate of the land remaineth. 8. Of necessity perjuries by reason of them will abound, for now the secret imagination and intent of men, and attempts and goings about shall be put in trial upon these clauses of restraint. 9. The king and lords shall lose their wards and escheats; for such devise may be made if the statute shall be construed for the preservation of contingent uses, that neither the king nor any other lord shall ever have escheats, or wards, or in effect any profit or fruit of their seigniories. 10. It would be absurd to say, that the makers of this act intended to preserve uses, when they expressly say, that they intend to extirpate and extinguish uses. Also it is absurd to think, that the makers of the act intended to preserve and *quodam modo* to revive the ancient common law, and yet intended to preserve or continue any such abuse and fraud which tendeth to the overthrowing of the common law; for they have declared, that the invention of these uses was subtle, fraudulent and crafty in disinherison of heirs, in defrauding the lords, of those who had right of their lawful actions, of purchasers, of tenant in dower, of tenant by the curtesy, causes of manifest perjury in defrauding the king and lords of their escheats, &c., in subversion of the ancient common laws, and the cause of many other inconveniences, and the occasion of great trouble and disturbance in the commonwealth. I say, it would be absurd to think that the makers of the act intended not only to continue, but to increase and preserve such wickedness, mischiefs, and inconveniences. It appears also by divers branches of the body of the act, that the makers of the act did not expect that any land after the statute should pass by limitation of uses, unless only uses upon bargain and sale which they thought convenient to continue. And therefore they did at the same parliament add to this inrollment of record, which is agreeable to the preamble, *scil.*, matter of record; but other uses they did not expect would after the act have been put in use, but that lands should pass by solemn livery, record, &c., as is contained in the preamble. And they thought, also, that little land would pass by bargain and sale inrolled, because such bargainee being in the *post*, shall never vouch by force of any warranty annexed to the estate of the land. And therefore it is to be observed, that there is not in the whole body of the act any saving for any *cestuy que use*, or of any use. * * * And so I conceive upon the whole matter, that the future uses in the case at bar by the said feoffment of the feoffees were utterly destroyed, and by consequence judgment ought to be given for the defendant.

And afterwards this case was openly argued by all the justices of England and the barons of the exchequer, in the exchequer chamber, at six several days: 1 By Baron EWENS and Justice OWEN; 2, by Justice BEAUMOND and Justice FENNER; 3, by Justice WALMESLEY and Justice GAWDY; 4, by Baron CLARK and Justice CLENCH; 5, by Sir W. PERIAM, chief baron of the exchequer, and by Sir ED. ANDERSON, chief justice of the common pleas; and 6, by Sir J. POPHAM, chief justice of England. All of which arguments of the judges and barons I heard, except only that of Justice BEAUMOND, and therefore what I shall say of that, I shall say by credible relation of others; but my intent is not to report any of their arguments at large, and in the same form as they were delivered by them, but to make such a summary collection of the effect and substance of them all, as the matter (it being the first case which was adjudged, and being of great importance) will permit. And because Justice WALMESLEY and the Chief Baron [PERRIAM] only argued that judgment should be given for the plaintiff, and all the other judges and barons concluded against the plaintiff, I begin with the effect of their two arguments, viz.:

WALMESLEY [J.]: Before the statute of 1 R. 3, the feoffees had not only the whole estate in the land, but also the whole power to give and dispose of it, for *cestuy que use* was a trespasser if he entered upon the land against their will; and after the statute of 1 R. 3 *cestuy que use* had power to make a disposition of the land itself, and yet notwithstanding that, the whole estate of the land did remain in the feoffee until *cestuy que use* had made such a disposition, for which reason the said act intending to provide for *cestuy que use* had not made a sufficient provision for him. For the estate of the land remaining in the feoffees, they many times contrary to the trust reposed in them, by secret feoffment, estates, and other covenous acts had defrauded *cestuy que use,* and had prevented such disposition of the land which the said act of 1 R. 3 gave him; and as WALMESLEY said, there was sometimes fraud in both, for when *cestuy que use* by himself without the feoffees, by force of the statute of 1 Rich. 3 [c. 1] and the feoffees by themselves without *cestuy que use,* by the common law, had both severally absolute power to make disposition of one and the same land; sometimes *cestuy que use* by his secret estates prevented the feoffees, and sometimes the feoffees by the like secret estates prevented *cestuy que use;* so that, as he said, they played at double hand, and thereby frustrated the true intent of the act. And the CHIEF BARON and WALMESLEY said, that the statute of 27 Hen. 8 [c. 10] was not made to extinguish or eradicate any uses, but the statute of 27 Hen. 8 [c. 10] hath advanced uses, and hath now established safety and assurance for *cestuy que use* against his feoffees; for before the statute the feoffees were owners of the land, and now the statute hath made *cestuy que use* owner of the land; before the statute the possession governed and ruled the use, but now since the statute the use governs and rules the possession; for by the said act of 27 Hen. 8 the possession is a subject and follower of the use. And no word in

the preamble doth condemn uses, but for the extirpating and extinguishing of all such subtle practiced feoffments, fines, recoveries, abuses, &c., so that the uses are not guilty of the inconveniences mentioned in the preamble, but the feoffments, fines, and recoveries, subtilly and craftily practiced; so that the intent of the act was to extirpate and extinguish (which are both significant words) all such feoffments, fines, recoveries. But how? By destroying of uses? No, truly, but by devesting the whole estate out of the feoffees, conusees, and recoverers, and vesting it in *cestuy que use,* so that it would be against the meaning and the letter of the law also to say that any estate or right, or *scintilla juris,* should remain in the feoffees after the statute of 27 Hen. 8 [c. 10], for it appears by the preamble, that the makers of the act intended to extirpate and eradicate the whole estate of the feoffees, and the letter of the body of the act is that the estate, right, title, and possession that was in such person or persons that were or hereafter shall be seised of any lands to the use of such person be from thenceforth clearly adjudged and deemed in him or them, &c., so that by a judgment given by the whole parliament the estate shall be out of the feoffees. And the CHIEF BARON said that *scintilla juris* which is mentioned in 17 Eliz. [Dyer 340, pl. 49] is like Sir Thomas Moore's Eutopia. And they said, that since this statute no trust or confidence was reposed in the feoffees; for now, as WALMESLEY said, the feoffees *non possunt agere aut permittere aliquid* in prejudice of *cestuy que use.*

Before the statute the office of the feoffee was to execute the estate according to the use, but now the statute hath taken away all the office of the feoffees, and now the act executes the possession to the use, and takes away all the trust and power out of the feoffees. And the letter of the statute of 27 Hen. 8 [c. 10] is, "where any person or persons stand or be seised, or at any time hereafter shall happen to be seised;" and they relied much upon these words *at any time;* for it seemed to them by these words, that the seisin which the feoffees had at the beginning by the feoffment, would be sufficient within this act, to serve all the uses as well future, when they come *in esse,* as present, for there need not many seisins, nor a continued seisin, but a seisin at any time; so a seisin at one time would suffice, for the statute saith seisin *at any time;* and it would be hard, when the statute requires but one seisin at one time only, that many seisins and at several times, against the intent and letter of the act, should be required. The statute of 27 Hen. 8 [c. 10] extends to all lawful and good uses as well future as *in esse,* and no such use is destroyed but advanced and extolled, as hath been said before. And WALMESLEY said, that if such construction should be made to destroy these future uses, the usual pleading in practice ever since the statute ought to be altered; for the pleading of a feoffment in fee to future uses after that they come *in esse,* is *virtute cujus & vigore actus parliamenti, &c., de usibus in possessionem transferend' cestuy que use* was seised, &c.; so that one seisin is sufficient, as is proved by the usual form of pleading, but now the pleading of it must be al-

tered, if many seisins should be requisite, and then more seisins than one ought to be alleged. And he said, as a fountain gives to every one which comes in his turn to it his just measure of water, so the first seisin and estate in fee, given by the first feoffment to the feoffees, is sufficient to yield to all persons, to whom any use present or future is limited, a competent measure of estate in their time, proportionable to their estates which they shall have in the use. So that it seems to them, that the first seisin by force of the feoffment by which the fee simple is given to the feoffees would be sufficient to serve all the particular uses as well future as present in their several times, and nothing should remain in the feoffees. But WALMESLEY said, that the whole estate shall be first vested in those who are *in rerum natura,* and the possession shall be vested in him who hath the future use, when it comes *in esse,* by force of the first livery, and shall divide the estates which were conjoined before. And he agreed that an alien, or a person attainted, or a corporation, could not at this day be originally infeoffed to the use of another, for no use can be created out of their seisin. J. S. makes a feoffment in fee to divers natural persons to certain uses, some present and some future, so that the uses are well created and raised, although a corporation be afterwards infeoffed of the land, yet the future uses when they come *in esse,* shall be raised and executed by force of the first livery, and the first seisin of the feoffees, and by force of the act, as he conceived. And WALMESLEY further said, that the future uses in our case cannot be suspended, for a thing which never was *in esse* cannot be suspended, but the whole estate vests first in them who have the present uses, or the uses *in esse,* and when the future uses come *in esse,* then they shall come in between the other estates which were conjoined before. And in proof thereof they cited the case of *Cranmer* in 14 Eliz., reported by the Lord Dyer, fol. 309; and the case *de seniori puero* in 16 Eliz., reported also by the Lord Dyer, fol. 337; and the case in 5 Hen. 7, 6a. If *cestuy que use* by force of the statute of 1 Rich. 3 [c. 1] makes a feoffment in fee upon condition, and after enters for the condition broken, the feoffees should never have the land again, because all the interest and privity of the feoffees was once by the feoffment taken out of them. So the case in 19 Hen, 6, fol. 76; and 2 Edw. 4, 2; if a man makes a feoffment in fee upon condition that he shall make a feoffment over in fee, in that case, if the second feoffee refuses, the feoffor shall enter, for it was the intent of both parties, that the feoffee should depart with his whole estate, and nothing should remain in him. Otherwise it is if the condition was that he should make a gift in tail. And he said, if a feoffment be made of land to the use of A, and there is also a rent issuing out of the same land to the use of B, although the possession of the land be disturbed by disseisin, yet the use of the rent is not disturbed thereby, because the disturbance is done to another seisin, that is to say, to the land, and not to the seisin of the rent out of which the use is limited. So in the case at bar, the disturbance is not to the first seisin given

by the feoffment, out of which all the uses, as out of a fountain flow, but the disturbance is done to other seisins, *scil.* to seisins executed by the statute of 27 Hen. 8 [c. 10], and not to the first seisin, which by no means can be tolled or devested; for it hath not any essence until the future use hath essence, which by force of the statute shall draw a sufficient estate to it, but when the future use is come *in esse,* now by reference and relation to the first seisin there is seisin and use within the statute of 27 Hen. 8 [c. 10]. And in proof thereof he cited *Bracebridge's Case,* 15 Eliz., [1 And. 113] which in effect was: A man made a feoffment of a manor to several persons to certain uses, upon condition that if certain money was not paid within a certain time, that then they should stand seised to other uses; the money was not paid, and after attornment was had to the feoffees, when the possession of the demesnes was executed before by the statute; in that case after the condition broken *cestuy que use* had possession of the land by force of the first livery; and yet there was not any continuance of seisin in the feoffees, neither were the feoffees seised of the land at the time of the execution of the possession to the use.

And the case of 13 Eliz., Dyer, fol. 298b; [*Kyghly's Case*] 22 Eliz. [Dyer] 369a; tenant *in capite* infeoffs one and his heirs, provided that when the feoffor shall pay 100*l.* to him or his heirs, that then it shall be to the use of the feoffor and his heirs; the feoffee dies, his heir within age, the 100*l.* is paid, office is found, the feoffor shall have the use by force of the first livery, and by relation to that, shall defeat the wardship of the body and land. And he said, if a man makes a feoffment in fee to the use of himself for life, and after to the use of another in tail, with divers remainders over with power to the lessee for life to make leases for 21 years, or 3 lives, in that case, if the tenant for life makes a lease for 21 years or 3 lives, it ought to be derived and take its essense out of the first feoffment, or otherwise all leases would be determined by the death of the lessee for life, and in the same case there is not any seisin continuing in the feoffees, but the first seisin is sufficient, and this is consonant to the words of the act of 27 Hen. 8 [c. 10], for it saith, that the estate that was in the feoffee shall be adjudged in *cestuy que use.*

But PERIAM, chief baron, conceived, that these future uses before their births are not preserved in the bowels and belly of the land, but that they were *in nubibus,* and in the preservation of the law; for he well agreed with WALMESLEY, that by force of the act the whole estate shall be out of the feoffees, and then of necessity, he said, it ought to be in some person, or in abeyance and consideration of the law. And it would be absurd to say that the feoffees should have a less estate than they took by the first livery. And therefore because nothing remains in the feoffees, and this future use, cannot be executed until the person who should take it comes *in esse,* it must of necessity be in the meantime in the preservation of the law. And if any case be doubtful

upon a statute it is good to construe it according to the reason of the common law, as it is said in *Dalamer's Case* in Plow. Com. 351.

And if the estate in our case had been limited in possession by livery and seisin, the remainder to the eldest son, &c., till his birth it would be by the rule of the common law in the consideration of the law; and by the same reason the use shall be in our case; and as the use shall be, so shall be the possession by force of the statute, for be the use *in esse,* or in the consideration of the law, the possession shall be transferred to it by force of the statute. And he took a difference between feoffees before the statute and feoffees since the statute, for if feoffees to an use were disseised before the statute, no use could be executed after the statute without regress of the feoffees, for the statute saith, which be or at any time hereafter shall be seised, &c. And those who were disseised before the statute were not seised at the time of the act, nor at any time after until regress; otherwise it is when the feoffment is made after the statute *causa qua supra.* And where the statute saith, to the use of any person or persons, the statute doth not say, to the use of any person or persons *in esse,* but to the use of another person, and that shall be intended when his time shall come; and it would be a hard construction to destroy these future uses in our case which were limited upon good cause and consideration, and especially when the sons, who then were not *in esse,* were not parties to any wrong, covin or practice. But he said, that the use by the common law was in abeyance and custody of the law; and the possession accordingly by force of the statute, for no other person can take it, and a thing which is committed to the custody of the law, the law will lawfully preserve without any violence or destruction. And therefore, 32 Hen. 6, if there be tenant for life the remainder to the right heirs of J. S. and tenant for life is disseised, and a descent cast, and after J. S. dies, and then the lessee for life dies, the entry of the right heir of J. S. is lawful, and he put also the case of the parson as to this purpose. And to prove that as well the possession as the use are in the custody of the law, he cited *Cranmer's Case* (14 Eliz., Dyer 309), that the remainder limited to the executors was in abeyance; and the *Earl of Bedford's Case* [Moore 718, 2 And. 197, *ante* —], in which case he said it was agreed, that the remainder to his right heirs was in the custody of the law until the death of John Lord Russel; and *Brent's Case,* 17 Eliz., Dyer 340, that the remainder limited to the wife that shall be, was in abeyance; and the like, *Bray's Case,* 2 Eliz., Dyer, 190, 191, where it was held, that the remainder limited to the wife that shall be, should be in abeyance; if the particular estate had not been but a term, which cannot by the rule of law support a remainder in abeyance. And he cited the cases in Brooke's Abr. *Feoffments al Uses* 30, (Hen. 8), and 50 pl. 3, M. pl. 59, when Brooke was chief justice. And he said, that these uses have extended themselves into many branches; and are to be resembled to Nebuchadnezzar's tree, for in this tree the fowls of the air build their nests, and the nobles of this realm erect and establish their houses, and under this tree lie

infinita pecora campi, and great part of the copyholders and farmers of the land for shelter and safety, and he said, if this tree should be felled or subverted, it would make a great print and impression in the land. And therefore it was convenient to repress the mischief after by parliament, and not to have any retrospect to cases before.

And he and WALMESLEY also agreed in their argument, that the uses in this case should follow the rules of estates at the common law. And therefore in this case if tenant for life dies before the birth of the son, the remainder in use shall be void; for such remainder would be void by the rule of the common law, if it had been made in possession, if the remainder do not vest during the particular estate, or at least when the particular estate determines, and no difference between uses and estates made in possession as to this purpose.

And so they concluded, that judgment ought to be given for the plaintiff.

And on the other side it was argued by BARON EWENS, Justice OWEN, Justice BEAMOND, Justice FENNER, Justice GAWDY, Baron CLARK, Justice CLENCH, the Lord ANDERSON [C. J. of the Common Pleas], and POPHAM, Lord Chief Justice [of the Queen's Bench], to the contrary. And it was agreed by them all that the feoffment made by the said feoffees who had an estate for life by limitation of the use devested all the estates, and the future uses also. And although Richard Chudleigh their feoffee had notice of the first use, yet it is not material, because all the ancient estates were devested by the said feoffment, and this new estate cannot be subject to the ancient uses which rise out of the ancient estate which was devested by the feoffment.

And GAWDY, justice, conceived that the uses limited to the eldest son, &c., were in abeyance; and he said, that the estates of the land sufficient to serve these future uses were in abeyance also. But he agreed it was not by the letter of the statute of 27 Hen. 8 [c. 10], but should be taken by equity of the said statute, for he said, the letter of the statute is, *to the use of any person or persons,* and here wanteth person; also in every case such person shall be *adjudged in lawful seisin,* &c., also, that the *estate,* &c., shall be adjudged in him or them that shall have such use; and, therefore, he said, the uses in abeyance by the equity of the statute did draw sufficient estate to serve them in abeyance also, and that for the saving and the maintenance of future uses, and that they should not be defeated and destroyed. And he agreed also that all the present uses as well precedent as subsequent were executed immediately; and he agreed with the other justices, that the statute of 27 Hen. 8 [c. 10] did not extend to subvert and destroy uses in other manner than by the executing and transferring of the possession of the land to them. And GAWDY cited the opinion of Fitzherbert in [Y. B.] 28 Hen. 8, fol. 12a., that it was an inconvenience and impossibility in the law before the statute of 27 Hen. 8 [c. 10] that two men should have several powers to make a disposition of the same land, *scil.* the feoffees by the common law, and *cestuy que use* by the statute of 1 Rich. 3 [c. 1], and that

inconvenience was intended to be remedied by this act of 27 Hen. 8 [c. 10], and he conceived that the whole estate should be out of the feoffees, for no right of the feoffees is saved which they have to another use, as it is said (7 Edw. 6) in *Stephen Davies's Case,* Dyer, 88b.

And if a feoffment in fee be made to the use of one for life, and after to the use of the right heirs of J. S., the fee-simple of the land shall be in abeyance; and before the statute if a man had made a feoffment to the use of one for years, and after to the use of the right heirs of J. S., this limitation had been good, for the feoffees remain tenants of the freehold; but such limitation after the statute is void, for then the freehold would be in suspense, for nothing can remain in the feoffees. But he said that these remainders in future were devested and destroyed by the feoffment of the tenants for life. And although the remainders be in custody of the law, yet they ought to be subject to the rules of the law, for the law will never preserve anything against the rule of law; and because the rule of law is, that he in the remainder must take the land when the particular estate determines, or else the remainder shall be void [*Archer's Case, post* —]; and in this case, forasmuch as by the feoffment of the tenants for life their estate was determined and title of entry given for the forfeiture, and then those in the future remainder were not *in esse* to take it, for this reason these remainders *in futuro* by this matter *ex post facto* were utterly destroyed and made void. And there is no difference when the estate of the tenant for life determines by the death of the tenant for life, and when it determines in right by his forfeiture, for in both cases entry is given to him in the next remainder, and then if he cannot take the land when the particular estate determines, the remainder is void. And if Strachley Chudleigh at the time of the forfeiture had been born, he might have entered for the forfeiture. If there be tenant for life, the remainder to the right heirs of J. S., if in that case tenant for life makes a feoffment in fee during the life of J. S. the remainder is destroyed, for otherwise there would be a remainder without a particular estate, which cannot be, no more in the case of an use than in the case of an estate made in possession. And upon that he cited *Bray's Case,* 3 Eliz., [Dyer 189b?].

And of the same opinion was POPHAM, chief justice, Baron CLARKE and OWEN, as to the said point of forfeiture, admitting that no disturbance or alteration of the estate had been made. And the chief justice denied the opinion of *Gascoigne* in 7 Hen. 4, 23b, who thought that such remainder should not be defeated by the feoffment of tenant for life. And Baron CLARK put the case in 11 Rich. 2 [Fitzherbert's Abr.], *Detinue* 46: A gift in tail was made to A. C., the remainder to the right heirs of A. S., the donee made a feoffment to B. in fee, and afterwards A. S. died; his right heir shall never have the remainder nor any charter that concerns it, for the estate of the land was by the feoffment of the tenant in tail devested and discontinued, and all estates vested in the feoffee, and there was not any particular estate neither *in esse,* nor in right to support the remainder when it should fall, for by the feoffment of

the tenant in tail his right was utterly gone, as Littleton says, and then at the time the remainder fell, *scil.*, at the time of the death of A. S., there was not any particular estate to support the remainder, neither *in esse* nor in right. And in the same case *nota dictum* by CHARLETON, chief justice and *judicium:* But if tenant in tail was disseised and died, that will not toll the remainder, for there a right of the particular estate remains to support the right of the remainder, but when the tenant in tail makes a feoffment no right remains in him. And OWEN, justice, said, if tenant for life had made a feoffment in our case before the birth of the son, he in the next remainder *in esse* should enter for the forfeiture. And GAWDY, *justice,* said, that in divers cases a thing in abeyance may be barred and destroyed; as if tenant in tail be disseised, and releases to the disseisor, now *Littleton* [Tenure, §649] says, the estate-tail is in abeyance, yet it may be barred by a common recovery in which the tenant in tail is vouched. So if there be tenant in tail, the remainder to the right heirs of J. S., if tenant in tail suffers a common recovery, the remainder is barred. So he said upon the [*Brent's?*] *Case* in 17 Eliz., Dyer 340, in which it was held that if a man makes a feoffment to the use of him and the wife he may marry], if the husband makes a feoffment in fee before the taking wife, the wife shall never take, for the possession and estate of the land is altered, changed, and transferred to the possession of another, before the title of the wife doth accrue; but if no devesting or alteration had been, then the use shall vest in the wife. And he resembled it to the case[s in] 22 Assize, pl. 37; 26 Assize, pl. 8; and 29 Assize, pl. 34, [which prove that] if a warranty be made to the possession of a villein, if the ancestor dieth, so long as it continues in his possession it shall bind; but if the lord of the vellein enters before the warranty doth attach, then the warranty shall not bind, for the lord of the villein is in by force of his title of villeinage, and the estate and the possession of the land doth not continue, but by the entry of the lord is altered and changed.

And it was held by Baron EWENS, OWEN, BEAMONT, FENNER, CLARK, CLENCH, the Lord ANDERSON, and POPHAM, lord chief justice, that at the common law, by disseisin or by such feoffment as in the case at bar, as well all future uses or uses in contingency are devested and discontinued, as uses *in esse*, till the first estate out of which the uses rise be recontinued. And the statute of 27 Hen. 8 [c. 10] doth not transfer any possession to any use but only to uses *in esse*, and not to any use in future or in contingency till they come *in esse;* and this appears by the express letter of the act, for, as there ought to be a person *in esse* seised to the use, so there ought to be an use *in esse* which should rise out of the estate, and there ought to be a person *in esse* who should take the use, before any possession can be transferred and executed to the use. For if the person who should take the use be not *in esse*, or if the person be *in esse* and no use be *in esse* but only possibility (as the Lord ANDERSON said) of an use, there can be no execution of the possession to the use. And as at the common law there can be no use *in esse*,

if there be no seisin out of which such use shall rise; so no use can be executed by the statute of 27 Hen. 8 [c. 10] unless there be seisin in some person subject to such use at the time of the execution thereof; for the express letter of the act is, *where any person or persons stand or be seised, or hereafter, &c., shall stand or be seised,* &c., to the use of any other person or persons. So that there ought to be a person *in esse* on both parts (*sc.* who shall be seised to the use, and who shall take the use), so that it is necessary not only to have an use limited, but a person capable of the use when the statute transfers the possession to it; and therefore if the person fail it is not possible to have the possession executed by this statute to one who is not *in rerum natura;* for the statute says, *To the use of any person or persons: In every such case, all and every such person and persons that have any such use in fee-simple, fee tail, for term of life or years, or otherwise, or any use in reversion or remainder,* &c. In which words note the word *such* is iterated three times; so that uses *in esse,* that is to say, in possession, reversion, or remainder, for there is no word of any possibility or contingency. And persons *in esse* are only within this act: *shall from henceforth be deemed and adjudged in lawful seisin, estate, and possession;* and that cannot be any person who is not *in esse,* nor any person who is *in esse* and who hath but a possibility of an use, who perhaps will never have an use *in esse.* And by these words it fully appears, that no estate by this statute can be transferred to the possibility of an use. And that the estate that was in such person or persons that were or hereafter shall be seised to the use of any such person or persons, *be from henceforth clearly deemed and adjudged to be in him or them, that have or hereafter shall have such use.* So that this clause doth not devest any estate out of the feoffees, but when it can be executed in the *cestuy que use,* (that is to say) in him or them that have or hereafter shall have such use, which one can't have who is not *in esse;* for he is not a person who can have an use, and by consequence cannot have any possession by this act. And it was further held by POPHAM and ANDERSON, the two chief justices, CLENCH, CLARKE, FENNER, BEAMOND, OWEN, and EWENS, that those who had argued on the other side had taken but the first part of the sentence, that is to say, *that the estate shall be out of the feoffees,* but they had forgot the latter part of the sentence, *scil., that the estate shall be in such person who hath the use,* and that cannot be till the person and the use also be *in esse.* And by this clause it also appears, that no estate of the feoffees shall be transferred in abeyance out of the feoffees, and vested in no body, or be transferred to a possibility of an use which hath not any being; for then an estate *in esse* would be transferred to the possibility of an use which hath not any being, which would be against reason, and against the letter and meaning of the act. For the words are, *and shall be adjudged in him or them that shall have such use;* therefore the estate of the feoffees shall not be in abeyance. And the two chief justices, FENNER, BEAMOND, OWEN, and EWENS, said, that if the estate should

be utterly out of the feoffees, and all vested in those who have the present uses (as some have held before), then the future use would never rise, for it is not possible that it should be raised out of the possession of *cestuy que use;* for an use cannot be raised out of an use, as is [Brooke's Abr.] 36 Hen. 8, *Feoffments al Uses,* 54; [*Tyrrel's Case*], 5 Mary, Dyer 155. And if A enfeoff B in fee to the use of C and his heirs, with proviso that if D pay C 100*l.* that C and his heirs shall stand seised to the use of D and his heirs, this is utterly void; for the future use ought to be raised out of the estate of the feoffee, and not out of the estate of *cestuy que use.* And it was held by them, that the feoffees since the statute had a possibility to serve the future use when it came *in esse,* and that in the meantime all the uses *in esse* shall be vested, and when the future use comes *in esse,* then the feoffees (if the possession be not disturbed by disseisin or other means) shall have sufficient estate and seisin to serve the future use when it comes *in esse* to be executed by force of the statute and that seisin and execution by force or the statute ought to concur at one and the same time.[1]

And this case is not to be resembled to cases at the common law, for an act of parliament may make division of estates; and forasmuch as this division is made by act of parliament, it is not necessary that the feoffees should have their ancient estates. And they said that this construction was just, and consonant to reason and equity; for by this construction the interest and power that every one hath, will be preserved by the act; for if the possession be disturbed by disseisin or otherwise, the feoffees will have power to enter to revive the future uses according to the trust reposed in them; and if they by any act bar themselves of their entry, then this case (not being remedied by the act) doth remain as it was at the common law. And the CHIEF JUSTICE and FENNER said, that if a man makes a feoffment in fee to the use of one for life, and after to the use of the feoffee [feoffor] in tail upon con-

[1] "This case [Manning and Andrews' Case (18 Eliz., A. D. 1586), 1 Leon. 256] is very important. It appears clearly that the doctrine of *scintilla juris* was not then received as law; and, indeed that no fixed or settled notions were formed respecting the operation of the statute on contingent uses. Geoffries thought with Manwood and Dyer (according to Leonard's report of Brent's Case, 2 Leon. 14) that a sufficient actual estate remained in the feoffees to support the uses, while Southcote and Wray were of opinion that the feoffees were by the statute mere conduit-pipes, and were divested of all estate. About eighteen years after Manning and Andrews' case the famous case arose which is constantly referred to as having decided the doctrine of *scintilla juris.* I allude to Chudleigh's Case. * * * When Chudleigh's Case is attentively considered our surprise cannot fail to be excited at its ever having been considered as a decisive authority for the doctrine in question. The opinion of the six judges on this point, as stated by Coke, was merely an *obiter dictum;* and there even appears to be reason to doubt whether any such opinion was ever delivered. In Lord Chief Justice Popham's report of the same case, this opinion is given as coming from himself only. And Lord Chief Justice Anderson, who is made by Coke to concur in this opinion, reports no such matter in his book." Sugden on Powers, 18, 19, 24, 25.

tingency, and after the contingency happens; in that case the feoffee is the donor, as it is proved by Brooke's Abr. (2 Edw. 6) *Br. Formedon* 41; (7. E. 6), *Ibid.* 46; Plow. Com. 59; 20 Eliz., Dyer 362., but it would be absurd, that the feoffee should be donor, and yet should have nothing, but be only as an instrument, or as the wind out of an organ-pipe. And FENNER put the cases in 7 Hen. 6, 3a; [Fitzherbert's Abr.] (13 Rich. 2), Dower 55; 29 Assize, pl. 64: If tenant for life makes a lease to him in reversion for the life of him in the reversion, although the lessee had but a freehold and departed with a freehold, yet the lessee hath a possibility which by the death of him in the reversion may come in estate. So although the estate of the feoffees be transferred to the uses *in esse,* yet a possibility doth remain in the feoffees, which may be reduced to an estate sufficient to serve the future uses. And he said, it was not strange that an act in law should alter the original estate, but then the new estate ought to be as near the ancient estate as may be, so that all interests may be served and saved according to the intent and meaning of the parties; as in the case of *Littleton* [Tenure §252], and 2 Hen. 4, 5b, [that] if a man makes a feoffment in fee upon condition to make an estate to husband and wife in special tail, and, before any gift made, the husband dies without issue; now by this act in law, the estate shall be made to the wife for her life without impeachment of waste, &c., and so by an act in law the original estate was altered.

And Baron CLARKE said, some have supposed these future uses were preserved in the bowels of the land, and that the land should be charged with them in whose hands soever it should come; and some have supposed they were preserved *in nubibus,* and in the custody of the law. But he said in our case be they below in the land, there they should be perpetually buried, and should never rise again; and be they above *in nubibus* (in the clouds), there they should always remain, and should never descend; for he said that the sons of Christopher Chudleigh in our case were not born in due time; and as this case is; they should never take the future use. And he put many good cases, when a son born out of fit and due time should not take. And upon that he put the case of ravishment, in 5 Eliz. 4, 6a: when the son is born after the entry of the daughter; and 9 Hen. 7, 25a; and 30 Assize, pl. 47; when the remainder limited to the right heirs of J. S. first vests in the daughter, and after the son is born; and many good cases were put by him to the same purpose. And further he said, as in the *Case of Kidwelly,* Plow. Com. 69b, the lessor by the original agreement of the parties may come upon the land, to demand his rent, although the estate of the land be transferred to another; so by the original agreement of all parties the feoffee may re-enter and revive such future uses, which by the law may be revived; and in such cases he said, that when the future uses shall come *in esse,* the feoffees shall have by force of the act a qualified estate sufficient to serve the future uses. And [he] resembled it to the case in 21 Edw. 3, 41b: King Edward III gave lands to the Black Prince and to his heirs kings of England; in that case the grantee had a quali-

fied inheritance; for inasmuch as the Black Prince died in the life of his father, and his son Richard was not then king, the land did revert.

So all the justices and barons of the exchequer except PERIAM, WALMESLEY, and GAWDY did conclude, that forasmuch as the statute of 27 Hen. 8 [c. 10] doth not extend but to uses *in esse*, and to persons *in esse*, and not to any uses which depend only in possibility; for that reason the contingent uses in the case at bar remain so long as they depend in possibility, only at the common law, and by consequence they might be destroyed or discontinued before they came *in esse*, by all such means as uses might have been discontinued or destroyed by the common law.

And all the justices and barons of the exchequer did agree with the CHIEF BARON [PERIAM] and WALMESLEY in this point, *scil.*, that these remainders limited in use in the case at bar should follow the rule and reason of estates executed in possession by the common law, and therefore they all unanimously agreed, that if the estate for life in the case at bar had been determined by the death of the feoffees before the birth of the eldest son, that the said remainders *in futuro* were void, and should never take effect although the sons were born after; for a remainder in use ought to vest during the particular estate, or at least *eo instante* when the particular estate ends, as well as an estate in possession. And it was held by all the justices that if the contingent use in the case at bar had come *in esse* without any alteration of the estate of the land, that it should be executed by the statute of 27 Hen. 8; but the alteration of the estate before it came *in esse* had destroyed it, as it hath been said. But if any such alteration of estate be before the essence of the future use, then the use should not be transferred into possession before the impediment removed, and the estate recontinued.

It was also held by the eight justices and barons who argued against the contingent use, that the statute of 27 Hen. 8 [c. 10] should not (against the express letter of it) be construed by equity for the maintenance and preservation of these contingent uses; forasmuch as by such construction, the mischiefs which were intended to be prevented by the makers of the act would be continued, or greater introduced, as after by the argument of POPHAM, chief justice, as to this point appears.

And POPHAM, Chief Justice, in his argument said, that by force of the act of 27 Hen. 8 [c. 10] some uses are executed immediately, some uses are executed by matter *ex post facto*, and some uses are extirpated and extinguished by the act. Uses *in esse* draw the possession immediately by force of the act; uses *in futuro*, limited agreeable to the rule of the common law, are also, if they come *in esse* in due time, within the purview of this statute, but uses invented and limited in a new manner not agreeable to the ancient common laws of the land, such uses are utterly extirpated and extinguished by this act; for it appears by the express letter of the act, that it was the intent of the parliament to extirpate and extinguish them, and to restore the ancient common law of the land. And therefore he said if a feoffment be made to the

use of A for life, and after to the use of every person who should be his heir, one after another, for the term of the life of every such heir only; in this case, if this limitation should be good, the inheritance would be in nobody; but this limitation is merely void, for the limitation of an use to have a perpetual freehold is not agreeable with the rule of law in estates in possession.

So if a man makes a feoffment to the use of one in tail with divers remainders over, with a proviso that if any shall attempt to purchase any *præcipe* against any tenant of the freehold, &c., that his estate shall cease, and that then the feoffees shall stand seised to the use of another, &c., such proviso or limitation is against the rule of the law, if it had been conveyed in possession, for he cannot limit new remainders upon such conditions; and at this day, an estate-tail in land cannot cease till entry, and no entry or re-entry is given to any but only to the feoffor or his heirs, and not to any in remainder. And he agreed the case, which was put before, with the proviso, that the estate in tail by limitation of an use shall cease as if tenant in tail was naturally dead, and not otherwise; for he said that such limitation would be void if it was limited in possession. And he said, there was no difference at this day between estates conveyed in use and estates conveyed in possession, for the estate and limitation of an use ought to be known to the common law, and governed and directed by the rules thereof. But he said the limitation of the uses in this case, as well future as *in esse,* were good and lawful, for such estates executed in possession were good; but the future uses were destroyed by subsequent matter, as hath been said.

And he said, if such a construction upon the statute of 27 Hen. 8 [c. 10] by equity or otherwise should be made for the maintenance and preservation of future uses, as hath been made by those who have argued on the other side, greater inconveniences would be introduced than were before the making of the statute of 27 Hen. 8. For he said the said construction did tend to the subversion of noble and great families, and to the disinherison of their heirs, so that no land subject to such perpetuities could continue four descents; for if he who is so restrained and bound with the provisoes of perpetuities should sell any part of the land for payment of any debts or legacies, or if he be taken prisoner in the war for his ransom, or for the preferment of his younger sons, or for advancement of his daughters in marriage, or for any cause, or upon any necessity whatsoever, he would forfeit his estate. Also when the eldest son knows he shall have the lands and possessions of his father, whether he will or no, it makes the son become dissolute and disobedient, so that he will not depend upon the government of his father, but refuse to be ruled and directed by him. It would likewise occasion variance and discord in the same blood, and in effect tear the bowels of nature; for it would stir up the son (upon every supposition of breach of the provisoes) to put his father out of the land; from whence great suits and troubles would arise, to the wasting and subver-

sion of the families, and so of the brother and brother; and of the cousin and cousin. And he who hath such perpetuity ought always to have a counsellor at law at his elbow, for he cannot do an act concerning his land, but his son, or he who is next to the land, watches for a forfeiture. Also he who hath an estate subject to such perpetuity, if he hath two several farms, out of which two several rents have been reserved, and peradventure where the several usual rents amount but to 40*s. per annum,* and he joins both in one lease for life, and reserves one rent of 4 marks *per annum,* it is a forfeiture of his estate. For upon this lease the usual and accustomed rent is not reserved; so in many other cases if he do not observe the precise form of power which is given him, it will amount to a forfeiture of his estate, and within two or three descents the provisoes and limitations will not be so fresh in memory, that every gentleman can, in every lease which he shall make, follow the precise form of the provisoes. Also if the wives of such persons become incontinent, and have issue by other men than by their husbands, this adulterous generation shall inherit the husband's lands, whether they will or no. And this would be a great occasion for women to offend, when they know their issues shall inherit, and many other inconveniences would ensue upon such a construction in maintenance of these perpetuities. And so men who intend to over-reach the providence of God, and covet to establish their lands in their blood by these ways, are in truth thereby the cause of the wasting and subversion of their houses. Also no purchaser would be sure of his purchase without an act of parliament, and where at the common law, if he had purchased the land *bona fide* without notice of the use, he had been free of the use, he will be now in a worse case, for the construction which hath been made, his lands shall be subject to these future uses.

Also farmers and lessees cannot have any certain and full assurance. For suppose a feoffment in fee be made to the use of one for life, and after to the use of another in tail, with remainder over, with power to the lessees for life to make leases, so that he reserves the accustomed rent payable to all those who shall have the reversion: if tenant for life makes leases according to his power, the lessees derive their interest out of the first feoffment, how then can the reservation of the rent be good, and how can his heir, or he in the remainder come at it? And if a proviso be added in the original assurance, that the lessees shall pay the rent, or that they shall enjoy it so long as they pay the rent, then forasmuch as it is no rent, it ought to be paid without any demand, and if he do not pay it, his interest shall immediately cease by the limitation of the use.

Also those who have cause of action will be in a worse case than they were before; for before this statute they might have an action against the pernor of the profits, but now all pernancies of the profits are taken away, as appears 28 Hen. 8, Dyer 32a, pl. 3, and in *Manxel's Case,* Plow. Com., and then by such subtle devices as in the case before

put, he who hath cause of action will never find one who shall be tenant to his *præcipe*, and so by such construction he will be without remedy.

Also perjury will be increased in respect of the secrecy more than it was before the statute, for no use could have been raised before this act but upon a transmutation of possession or upon a covenant or full contract by apt words upon good consideration concluded between the parties; but now uses will be determined and raised by words without any consideration upon a bare imagination and intention only without any conclusion, covenant, or contract. For if one intends, goes about or attempts, &c., he will lose his land, although he does nothing, or concludes nothing.

Also the king and other lords will lose their wards, escheats, and other profits of their seigniories; for if the said case before put of a perpetual freehold should be maintained, that no heir shall have but an estate for life, and that the inheritance shall be in nobody, what escheat, or ward, or heriot, or other profit will accrue to the king or other lords? And he said it was not the intent of him and the other justices to overthrow the tree of uses, but to lop the rotten and unprofitable boughs and branches dangerous to the estate of the commonwealth and men's assurances, so that the rest of the tree, which is profitable for the use of men, might the better prosper. And he said, the reason why the lord by escheat, or the lord of a villain should not stand seised to an use, is, because the title of the lord is by reason of his elder title, and that grows, either by reason of the seigniory of the land, or of the villein, which title is higher and elder than the use or confidence is, and therefore should not be subject to it. And the reason why a disseisor should not stand seised to an use was, because *cestuy que use* had no remedy by the common law for any use, but his remedy was only in chancery: And because the right of a freehold or inheritance could not be determined in chancery, his title should not be drawn into examination there; and for this reason a disseisor shall not be compelled in the chancery to execute an estate to *cestuy que use*, but *cestuy que use* shall compel his feoffees in the court of chancery to enter upon the disseisor, or to recover the land against him at the common law, and then the chancery will compel the feoffees to execute the estate according to the use; and the chancellor ought to direct uses according to the rules of the common law. And he said, before Richard the second's time, no act of parliament or other record, nor no book, nor any writing made any mention of uses of lands, having regard to the very words of the statute And therefore he said, that uses in such sense as we now take them, were not at the common law, but were invented in times of trouble for fear, or in times of peace by fraud; but he said, that confidence was at the common law, but not that which we now call use.

PERIAM, chief baron, held, uses were at the common law; but the Lord ANDERSON said, uses were neither by the common law, nor by any statute. For he said, uses were but imaginations, and nothing in the consideration of law, or for which the law hath given any remedy, and

that *cestuy que use* had nothing in the land, for if he came upon the land, he was by the law of the land a trespasser to the feoffees.

And afterwards the same Michaelmas term judgment was given for the defendant. * * *

"Pollaxfen, in his able argument on Hales v. Risley (Polex. 389), against the necessity of the feoffees entering to revest contingent uses, says, that at the time Chudleigh's Case was adjudged it was not taken for law that the destruction of the particular estate by feoffment or conveyance before the contingent remainder came *in esse* was a destruction of the contingent remainder. * * * We should never have heard of this fiction had it then been settled as I apprehend it now is: 1st, that where such a construction can be put upon a limitation that it may take effect by way of remainder, it shall never take place as a springing use (and it even seems to be law, that where a limitation was intended to take effect as a remainder and cannot it shall not be supported as a springing use); 2dly, that a *contingent* use or remainder [i. e., by way of remainder] must take effect if at all *eo instanti* that the preceding estate ceases; and 3dly, that springing uses must be so limited as to take effect, if at all, within the period of a life or lives in being, and 21 years afterwards, and a few months allowing for gestation." Sugden on Powers, 26, 28, 29.

In speaking on this case, Chancellor Kent says (4 Com. 238-243): "The doctrine of *scintilla juris*, Mr. Sugden says, was first started in Brent's Case (Dyer 340a) in 16 Eliz.; and the judges had great difficulty in settling the construction of contingent uses. One opinion was that the feoffees had a fee simple determinable to continue until the future use arose, and that they were not divested of their whole interest until the execution of (*239) all the uses limited upon the feoffment, but a sufficient portion of the fee-simple to serve the contingent uses remained vested in the feoffees. It was also held that the estate in the interim resulted to the feoffor. A majority of the court agreed that the statute devested the feoffees of all the estate when the contingency arose by a person being *in esse* to take. In Manning and Andrews' Case (1 Leon. 256) the judges were equally unsettled in their notions respecting the operation of the statute on contingent uses. * * * In a few years Chudleigh's Case arose and has ever been regarded as a great and leading case on the doctrine of contingent uses. * * * Chudleigh's Case was argued several times before all the judges of England, and we find the great names of Bacon and Coke among the counsel who argued the cause. The case is replete with desultory and curious discussions; and some of it Lord Hardwicke admitted to be so refined and speculative as not to be easily understood. The disposition and policy of the judges was to check contingent uses, which they deemed to be productive of mischiefs and tending to perpetuities. They regarded the statute of uses as intending to extirpate uses, which were often found to be subtle and fraudulent contrivances; and their evident object was to restore the simplicity and integrity of the common law. Notwithstanding the scholastic and mysterious learning with which the case abounds, it carries with it a decisive evidence of the acuteness, industry, and patriotic views of the sages of the law at that day. * * *

"The decision in Chudleigh's Case settled the doctrine that contingent remainders even by way of use were destroyed by the destruction of the particular estate. The judges gave the same operation to a feoffment in regard to contingent uses as they did in respect to contingent remainders. The fiction of a *scintilla juris* or possibility of entry in the feoffees, or releasees to uses, sufficient to feed the contingent uses when they came into existence, and thereby to enable the statute to execute them, has been deduced from these ancient cases. Such a particle of right or interest (*242) has been supposed to be indispensable to sustain the contingent use. * * * (*243) This view of the subject has been met and opposed

by some of the most distinguished writers on real property at the present day. Mr. Fearne (Remainders, 377-380) questions the existence and application of the doctrine of *scintilla juris* to that extent, and denies the necessity of actual entry any more in the case of contingent uses than in the case of contingent remainders in order to regain the requisite seizin to serve the contingent uses. He denies the necessity of actual entry by any person to restore a contingent use so long as the right of entry subsists in the *cestui que use;* and the *scintilla juris*, if of any real efficacy, must be competent to serve contingent uses without the necessity of actual entry. * * * Mr. Sugden takes a higher and bolder stand, and, by a critical review of all the cases, puts to flight this *ignis fatuus* of a *scintilla*, and shows that it never had any foundation in judicial decisions, but was deduced from extra-judicial dicta."

This *ignis fatuus* was more effectually annihilated in England by the statute of 23 & 24 Vic. (1860), c. 38, §7; which declares that where by any instrument an inheritance is limited to uses, expressed or implied, immediate or future, contingent or executory, or to be declared by virtue of any power, such uses shall take effect when and as they arise, by force of and relation to the estate and seizin originally vested in the person seized to the uses ;and the continued existence in him or elsewhere of any seizin to uses or *scintilla juris* shall not be necessary.

ARCHER'S CASE, In Common Pleas, Mich. 39 & 40 Eliz.—A. D. 1598—1 Coke 66b. Also reported as BALDWIN v. SMITH, Croke. Eliz. 437, 2 Aud. 37.

Between Baldwin and Smith in the common pleas, in a replevin; upon a special verdict, the case was such: Francis Archer was seized of land in a fee, and held in socage, and by his will in writing devised the land to Robert Archer the father for his life, and afterwards to the next heir male of Robert, and to the heirs males of the body of such next heir male; Robert had issue John, Francis died, Robert enfeoffed Kent with warranty, upon whom John entered, and Kent re-entered, and afterwards Robert died, &c.

And first it was agreed by ANDERSON, WALMSLEY *& Totam Cur'*. that Robert had but an estate for life, because Robert had an express estate for life devised to him, and the remainder is limited to the next heir male of Robert in the singular number; and the right heir male of Robert cannot enter for the forfeiture in the life of Robert, for he cannot be heir, as long as Robert lives: Secondly, that the remainder, to the right heir male of Robert is good, altho' he cannot have a right heir during his life, but it is sufficient that the remainder vests *eo instante* that the particular estate determines. And so it is agreed in 7 Hen. 4, 6 b. and *Cranmer's Case* (14 Eliz.), Dyer 309 a. Thirdly, which was the principal point of the case) it was agreed *per totam Cur',* that by the feoffment of the tenant for life the remainder was destroyed, for every contingent remainder ought to vest, either during the particular estate, or at least *eo instante* that it determines: for if the particular estate be ended, or determined in fact, or in law before the contingency falls, the remainder is void. And in this case, inasmuch as by the feoffment of Robert, his estate for life was determined by a condition in law annexed to it, and cannot be revived afterwards by any possibility; for this reason

the contingent remainder is destroyed, against the opinion of Gascoigne in 7 Henry 4. 23 b. But if the tenant for life had been disseised, and died, yet the remainder is good, for there the particular estate doth remain in right, and might have been revested, as it is said in 32 H. 6. But otherwise is it in the case at the bar, for by his feoffment no right of the particular estate doth remain. And it was said it was so agreed by POPHAM, chief justice, and divers justices in the argument of the case between *Dillon* and *Freine* [Pop. 70, And. 309, 1 Coke 120 a, Jenk. Cent. 276, *ante* —] *and denied by none.* See 11 R. 2, [Fitz. Abr.] Tit. Detinue 46. And note the judgment of the book, and the reason thereof, which case there adjudged is a stronger case than the case at the bar. But note reader, that after the feoffment, the estate for life to some purpose had continuance; for all leases, charges, &c., made by the tenant for life shall stand during his life, but the estate is supposed to continue as to those only who claim by the tenant for life before the forfeiture; but as to all others who do not claim by the tenant for life himself, the particular estate is determined: And by the better opinion the warranty shall bind the remainder, altho' the warranty was created before the remainder attached or vested, and altho' the remainder was in the consideration of the law, and he who shall be bound by it, never could have avoided it by entry, or otherwise. * * *

POWLE v. VEERE, in Chancery, 41 Eliz.—A. D. 1599.—Moor 554.

The case referred to WALMSLEY & KINGSMILL [JJ.], was that John, Count of Oxford, made a lease by indenture to Robert Veere, his brother, of a manor in Berks, for his life, which was executed by livery with these words, that if Robert should marry and his wife should out-live him it should remain to her for her life if he should by sealed writing or his last will declare he wished her to have it. Before taking any wife Robert made a feoffment to Tho. Nooke, the father, to whom the Count of Oxford levied a fine after the feoffment, and bargained and sold the land and suffered a common recovery as vouchee. Afterwards Robert took the defendant to wife and made declaration that she should have the remainder; and afterward he and his wife levied a fine *come ceo,* &c. with warranty of Robert and Nooke and their heirs. Later Robert made another declaration that his wife should have the remainder, and died, and she entered. And the question was if her entry on Powle the purchaser from Nooke was lawful. And the justices certified that it was not; but that the remainder, if it was ever good, was destroyed by the feoffment, because the freehold was supplanted before the vesting of the remainder; and also that the possibility in the wife was included in the fine, and the warranty was also barred. Wherefore the decree was accordingly for Powle.

WELLS v. FENTON, in C. B., Hilary, 43 Eliz., A. D. 1600.—Cro. Eliz. 826.

Ejectione Firmae. R. seized in fee, levied a fine to the use of himself for life, and after to the use of his wife who should be at the time of his death, for life, remainder to E in tail. R takes to wife A; he and A his wife, by fine, reciting that he is tenant for life, remainder to said A for life, give it to a stranger in fee, who renders it to the husband for life, remainder to F for 60 years, remainder to the right heirs of the husband. The husband dies, the said A being his feme, survives, and disclaims to have anything in the land. E enters, lets to the defendant; she [A] takes another husband, and they make a lease to the plaintiff. Upon all these matters disclosed these points were moved: 1. Whether this contingent remainder to the wife who should be, was good. For although such a contingent remainder may be by way of limitation of an estate of land *in esse,* yet it cannot be of any use; for the statute of 27 Hen, 8, c. 10, doth not execute uses, but those only which are *in esse.* and preserves not any contingent uses, for no seisin continues to preserve them. And of that opinion was ANDERSON [C. J.]. But WALMSLEY and WARBURTON [JJ.] *e contra;* for it was good at the time of limitation, and stood with the rules of common law, and for the benefit of the commonwealth, that such limitations or jointures should be good; and therefore the law preserves and regards them, unless there be some mean act afterwards done to destroy them. But an use limited to J. S. until a præcipe be brought, and then to the use of J. D., this contingent use of J. D. is against law and justice to defraud a præcipe, and therefore is void.

2. Whether by the joinder in this fine the feme hath given her possibility, so as she cannot afterwards claim it. WALMSLEY [J.] held that she had not, for she hath not any estate, nor was there any certain person who might have it: for it is unto her who shall be his wife at the time of death, and it is not known who that shall be. But where the person is certain, although the estate be but in possibility, there peradventure she might have excluded herself thereof. * * * Adjudged for the plaintiff.

ANONYMOUS, in Common Bench, Mich. 5 Jac. 1, A. D. 1608.—4 Leon. 236.

If land be given to A & B for the life of C, remainder to the right heirs of A *or* B who shall survive; it was held that if A release to B, that the remainder was destroyed. And if land be given to one in tail, and if J comes to Westminster such a day, the remainder to J in fee, if the estate tail descends to two coparceners, who make partition; now if J come to Westminster the fee shall not accrue, because the particular estate is not in the same plight as it was before.

REEVE v. LONG, in King's Bench, Easter, 6 W. & M.—A. D. 1695.—1 Salk. 227, Carth. 309, 3 Lev. 408, 4 Mod. 282, Skin. 430, Comb. 252, Holt 228, 286, 5 Gray P. Cas. 53. From Salk.

Error of a judgment in common bench in ejectment, wherein a special verdict was found, and the case was: John Long being seised in fee devised the lands to his nephew Henry Long for life, remainder to the first son in tail male, and so on to the second, third, &c. And for default of such issue, remainder to his nephew Richard Long, lessor of the plaintiff, for life, remainder to the first son in tail, and so on to the second, third, &c., with divers remainders over. The devisor died, Henry married, and died without issue, leaving his wife enceinte with a son. Richard entered as in his remainder, and afterwards the posthumous son (the defendant) was born, and his guardian entered upon the lessor; whereupon he brought this ejectment and judgment was given for the plaintiff in the common bench by the whole court. And now that judgment was affirmed by this court; and resolved: 1. That the remainder to the first son of Henry is a contingent remainder, and must take effect during the particular estate of Henry or the instant that it determines; that by consequence this remainder to the son became void by the death of the tenant for life before he had a first son.

2. That this was such a default of issue, or dying without issue, that instantly the remainder limited over to Richard vested in him, and he became seised in possession; and this cannot be defeated, nor the estate fetched back again, though Henry has a son born afterwards.

But *note:* this judgment was afterwards reversed in the house of lords, against the opinion of all the judges, who were very much dissatisfied, and blamed the judge who tried the cause, for suffering a special verdict to be found.

This case has caused the enactment of the following statute:

10 & 11 Wm. III, c. 16, (1699)—An Act to Enable Posthumous Children to take Estates as if Born in the Father's Lifetime. Whereas it often happens, that by marriage and other settlements, estates are limited in remainder to the use of the sons and daughters, the issue of such marriage, with remainders over, without limiting an estate to trustees to preserve the contingent remainders limited to such sons and daughters, by which means such sons and daughters, if they happen to be born after the decease of their father, are in danger to be defeated of their remainder by the next remainder after them, and left unprovided for by such settlements: Be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal and commons, in this present parliament assembled, and by the authority of the same, That where any estate already is or shall hereafter, by any marriage or other settlement, be limited in remainder to or to the use of the first or other son or sons of the body of any person, lawfully begotten, with any remainder or remainders over to or to the use of any other person or persons, or in remainder to or to the use of a daughter or daughters lawfully begotten, with any remainder or remainders over to any other person or persons, that any son or sons, or daughter or daughters, of such person or persons, lawfully begotten or to be begotten, that shall be born after the decease of his, her, or their father, shall, and may, by virtue of such settlement, take such estate so limited to the first and other sons, or to the daughter or

daughters, in the same manner as if born in the lifetime of his, her, or their father, although there shall happen no estate to be limited to trustees, after the decease of the father, to preserve the contingent remainder to such afterborn son or sons, daughter or daughters, until he, she, or they came *in esse*, or are born, to take the same, any law or usage to the contrary in anywise notwithstanding.

Statute of New York, Mich, &c. "When a future estate shall be limited to heirs or issue or children, posthumous children shall be entitled to take in the same manner as if living at the death of their parent." N. Y. R. S. (1828), pt. 2, c. 1, t. 2, Art. 1, § 30; Mich. R. S. (1846), c. 62, § 30, C. L. (1897), § 8812; Minn. St. (1866), c. 45, § 30, R. L. (1905), § 3219; Wis. R. S. (1849), c. 56, § 30, St. (1898), § 2054.

"A future estate depending on the contingency of the death of any person without heirs or issue or children, shall be defeated by the birth of a posthumous child of such person, capable of taking by descent." N. Y. R. S. (1828), pt. 2, c. 1, t. 2, Art. 1, §31; Mich. R. S. (1846), c. 62, §31, C. L. (1897), §8813; Minn. St. (1866), c. 45, §31, R. L. (1905), §3220; Wis. R. S. (1849), c. 56, §31, St. (1898), §2055.

ADAMS v. SAVAGE'S tenants, in King's Bench, Easter, 2 Anne, A. D. 1703 —2 Lord Raym. 854, 2 Salk. 679, 5 Gray's P. C. 119. Given according to L. Raym.

A *scire facias* was sued by the plaintiff as administrator, to J. S., upon administration granted to him by the arch-deacon of Dorset, upon a judgment recovered by the intestate against Savage in this court. The issue after pleading, was, whether Savage was seised of the lands, &c., in fee? Upon which the jury found a special verdict, that Savage, being seised in fee, conveyed the lands by lease and release to trustees and their heirs, to the use of himself for 99 years, if he should so long live, remainder to the trustees for 25 years, remainder to the heirs male of his body, remainder to his own right heirs. The question was, if Savage, during his life, not having heirs male of his body, should have a use result to him for his life, and so become tenant in tail in possession; or if no use could result, and then, there being no freehold to support the contingent remainder to the heirs male of the body of Savage, the said remainder would be void, and Savage seised in fee as before.

THE COURT HELD, that no use could result to Savage during his life, and therefore the remainder to the heirs male was void, and Savage seised in fee. And their reasons were, because the limitations to himself for 99 years and to the trustees for 25 years, and the heirs male were new uses, and new estates. As if a man, by lease and release, or by covenant to stand seised, limit the use to himself for life, or in tail, these are new estates and not parcel of the old estate, according to *Englefield's Case*, 7 Coke 13b. And where in such case upon a conveyance such uses are limited, as (supposing the limitations to be good), would pass the whole estate, there no use will result contrary to the express limitations of the party. But if the limitations are void, the conveyance of necessity will fail. If a man seised in fee convey his estate by lease and release to the use of himself for life, remainder to trustees for lives, remainder to the heirs of his body, he hath an estate

tail in him; but he is but tenant for life in possession; otherwise if there had been no intermediate estate in the trustees for their lives. And in the former case, if a man makes a feoffment, it is no discontinuance, but only divests the estate. And for the same reason in this case, where the first limitation is only for years, the remainder to the heirs of the body of the tenant for years is a contingent remainder, and void. These are the reasons of Chief Justice HOLT.

POWELL, justice, said, that there was a difference, where the limitation was upon a covenant to stand seised, and where upon a lease and release. For where the limitations are to take effect out of the estate of the covenantor, there if the limitations were such as could not take effect immediately, or not till after the death of the covenator, as in the case of *Pybus* v. *Midford,* 2 Lev. 75, there the law may mould the estate remaining in the covenantor into an estate for life; but that cannot be where the limitations are to take effect out of the estate of the trustees, for want of a limitation, much less against an express limitation. And therefore (by him) if there had been an express limitation in the case of *Pybus* v. *Midford,* limited to the convenantor, the judgment would have been otherwise. And for these reasons, the whole court ordered last hilary term, that judgment should be entered for the plaintiff, unless cause should be shown to the contrary by the first day of this term. * * *

In accord with this decision is Rawley v. Holland (1712), 22 Vin. Abr. 187, pl. 11. These cases have been doubted by Mr. Sergeant Hill and Mr. Sanders (1 Sanders Uses 142, 143; 148, 5th ed.), and denied by Mr. Butler to be law (note y to Fearne Cont. Rem. p. 41), and Mr. Preston lays down a doctrine opposed to these cases (1 Prest. Abst. 114, 130, 131). Sir Edward Sugden defends these decisions (Sugden's Gilbert on Uses and Trusts 35, note); and, in the opinion of Mr. Williams, has sufficiently answered Mr. Butler's objections (Williams on Real Prop. 17th ed. p. 457, note i). Prof. Gray considers these cases substantially overruled by Gore v. Gore, post 263, and believes that if brought directly in question they would be expressly overruled. See Gray on Perpetuities §§ 59, 60.

"It is well settled that if a future limitation can be a remainder it must be so construed, and not as a springing use; but it is a very different thing to say that a good springing use must be construed into a bad remainder because it is preceded by an estate which is insufficient to support a remainder. To construe a limitation as a remainder if it can be a remainder is one thing; but to insist upon construing it as a remainder when it cannot be a remainder, seems to be the very wantonness of destruction." Gray's Rule against Perpetuities, §59.

FABER v. POLICE in S. Car. S. Ct., 1877—10 S. Car. 376, Tied. R. C. 367.

Action by John L. Faber against J. G. Police to recover damages for breach of a contract to buy land of plaintiff. From judgment for plaintiff defendant appeals.

The defense was that the plaintiff's title was defective. Plaintiff's father devised the land to trustees "in trust to and for the use, benefit, and behoof of my son," the plaintiff, for life, and then "in trust to and

for the lawful issue of my said son living at the time of his death: * * * and should my said son die without leaving lawfully begotten issue, living at the time of his death, * * * then unto my residuary devisees and legatees, their heirs and assigns forever." After the death of the testator the plaintiff conveyed the land by deed of feoffment with livery of seisin to another who deeded it back the next day, after which plaintiff deeded it to his mother, through whom he claims title as her sole heir.

McIver, A. J. * * * The appellant contends that the estate limited to the issue of John Lewis Faber is vested and not a contingent remainder, and therefore the remainder was not barred by the deed of feoffment and livery of seisin * * * It is very clear, from the language used, that the testator did not intend that the issue should take the estate in remainder absolutely and at all events, but only on a contingency—that of their surviving their father; and it is equally clear that he did not intend that the residuary legatees and devisees should take the estate in remainder absolutely and at all events, but only on a contingency—that of the son dying without issue living at the time of his death. * * * A vested remainder is one which is limited to an ascertained person in being, whose right to the estate is fixed and certain, and does not depend upon the happening of any future event, but whose enjoyment in possession is postponed to some future time. A contingent remainder on the other hand is one which is limited to a person not in being or not ascertained; or if limited to an ascertained person, it is so limited that his right to the estate depends upon some contingency in the future; so that the most marked difference between the two kinds of remainders is that in the one case the *right to the estate* is fixed, though the *right to the possession* is deferred to some future period; while in the other the right to the estate as well as the right to the possession of such estate is not only deferred to a future period, but is dependent upon the happening of some future contingency. * * * These estates, as well the particular estate for the life of John Lewis Faber as the estate in remainder to his issue, and in default of such issue to the residuary legatees and devisees, passed out of the testator at the time of his death—the time when his will, the instrument by which the estates were created, speaks. Then it was that these estates were created, and to that point of time must we look to determine their character. It is very clear that at that time it was wholly uncertain who would be the persons to take at the termination of the particular estate. The life tenant then had no issue, and it was of course uncertain whether he would ever have any; and as to the issue which he has subsequently had it is yet uncertain whether any of them will be living at his death; and the same uncertainty exists as to whether the residuary legatees and devisees will ever have a right to take. * * *

Hence the remainders are contingent. If so, then it necessarily follows, upon the authority of *Redfern* v. *Middleton,* Rice (S. Car.) 459,

in which the court of errors adopted the reasoning of Chancellor Harper in his decree in *Dehon* v. *Redfern*, Dud. 115, that the contingent remainders to the issue of John Lewis Faber, and in default of such issue to the residuary legatees and devisees, were barred by the deed of feoffment and livery of seisin to Folker. * * *

But, second, it is argued by the appellant that, even if the remainders be construed to be contingent and not vested, yet the deed of feoffment and livery of seisin could not bar such remainders, because the legal estate was vested in the trustees. This proposition might be admitted if it were true that the legal estate was in the trustees. It becomes necessary, therefore, to consider that question. The rule undoubtedly, is that where there is a conveyance to one for the use of another, and the trustee is charged with no duty which renders it necessary that the legal estate should remain in him to enable him properly to perform such duty, the statute of uses executes the use and carries the legal title to the *cestui que use*. By the terms of the will under consideration it does not appear that the trustees are charged with any duty whatever. * * * The other justices concurred.

Affirmed.

Statute of New York, Mich., &c. "No expectant estate can be defeated or barred by any alienation, or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate by disseizin, forfeiture, surrender, merger, or otherwise." **N. Y.** R. S. (1828), pt. 2, c. 1, t. 2, Art. 1, § 32; **Mich.** R. S. (1838), pt. 2, t. 1, § 84, C. L. (1897), § 8814; **Minn.** St. (1866), c. 45, § 32, R. L. (1905), § 3221; **Wis.** R. S. (1849), c. 56, § 32, St. (1898), § 2056.

"No remainder, valid in its creation, shall be defeated by the determination of the precedent estate, before the happening of the contingency on which the remainder is limited to take effect; but should such contingency afterwards happen, the remainder shall take effect, in the same manner and to the same extent, as if the precedent estate had continued to the same period." **N. Y.** R. S. (1828), pt. 2, c. 1, t. 2, Art. 1, §34; **Mich.** R. S. (1846), c. 62, §34, C. L. (1897), §8816; **Minn.** St. (1866), c. 45, §34, R. L. (1905), §3223; **Wis.** R. S. (1849), c. 56, §34, St. (1898), §2058.

What are Contingent?

BORASTON'S CASE, in Queen's Bench, Hilary, 29 Eliz., A. D. 1587,—3 Coke 19a, 25 Eng. Rul. Cas. 579. Abridged from Coke.

Ejectione firmæ by Richard Hynde against William Ambrye. Plea, not guilty. The jury gave a special verdict finding that Thos. Boraston, seised of the lands in fee, and having issue two sons, Humphrey the elder having a daughter Constance, and Henry the younger (who had a son Hugh), made his will in writing, Aug. 12, 1559, by which he devised the lands in these words: "Item, I give to Thomas Amery and Amphillis his wife, all that my upper part of my close called Reading, for eight years next after my decease; * * * And after the said term of eight years, the said upper part to remain to my executors until such time as Hugh Boraston shall accomplish his full age of 21 years, and the mean profits to be employed by my executors towards the per-

formance of this my last will and testament; and when the said Hugh shall accomplish his age of 21 years, then I will he shall enjoy the said upper part, to him and his heirs for ever." The testator died Aug. 14, 1559. Hugh died when nine years old. After the expiration of the terms of Thomas Amery and wife and to the executors, Philip Boraston entered on the lands as brother and heir of Hugh, and leased them to William Ambrye, defendant herein; on whom Thomas Brand and Constance his wife, and William Davies and Margaret his wife, claiming in right of their wives as daughters and heirs of Humphrey, testator's oldest son, entered and leased the lands to the plaintiff herein, by force whereof he was possessed, till the defendant by command of Philip reentered. The question referred to the court was whether the entry of the defendant was lawful.

Counsel for Plaintiff argued that no remainder vested in Hugh till he attained 21 years of age, and that in the mean time the lands descended to the daughters of the eldest son, as general heirs of the devisor; and because Hugh never attained his age of 21, the land never vested in him, but remained in the general heirs; for by the words of the will he should not have it till his said age. So it appears that the devise to Hugh depends on the contingency of his attaining his age, and whether he would ever attain it no man could know.

It was also said, that when a particular estate which doth support a remainder may determine before the remainder can begin, there the remainder shall not presently vest, but shall depend in contingency; as if one makes a lease to J. S. for his life, and after the death of J. D. to remain to another in fee, this remainder doth depend in contingency; for if J. S. dies before J. D. the particular estate is determined before the remainder can begin. So and on the same reason it was adjudged in *Colthirst* v. *Bejushin* [reported *ante* p. —] A lease is made to one for life, remainder to the right heirs of J. S., this remainder is good upon a contingent, that is to say if the lessee survives J. S., otherwise not. So, and for the like reason, if a man having a son of the age of nine years, makes a lease until his son shall attain his full age, and after he shall attain his full age, that it shall remain over to another in fee, nothing presently vests in him in remainder, which was granted by the whole court. And it was said by the plaintiff's counsel, that such remainder is utterly void, and yet it may take effect; for, in as much as the remainder ought to pass out of the lessor presently, either to him in remainder, or to be in abeyance and custody of the law, and a freehold cannot in such case be in abeyance, for this cause the remainder is utterly void; as if a man makes a lease to A for 21 years if B shall live so long, and after the death of B that it shall remain over in fee, this remainder over is void. So if a lease for years be made, the remainder to the right heirs of J. S., this remainder is void; which was granted by the whole court. Also it was said, that when a remainder is limited to take effect on the doing of an act, which act will be the determination of the particular estate, yet if the act depends on a casualty and mere

uncertainty whether it will ever happen or not, there also the remainder doth depend in contingency, and shall not presently vest: as if A makes a feoffment to the use of B till C come from Rome to England, and after such return to remain over in fee, this remainder doth depend in contingency, for it is uncertain whether C will ever return; which was granted by the whole court. And so it was concluded by plaintiff's counsel, that for all these causes judgment ought to be given for the plaintiff.

Defendant's Counsel conceived the remainder vested in Hugh presently by the death of the devisor; and by his death without issue, the land descended to Philip his brother, who leased to the defendant. It was said that although Hugh died before his full age, yet the interest and term of the executors did not cease; and their reason was, because in wills the intent of the devisor is to be considered, and when he deviseth his lands to his executors till Hugh his son shall come to his full age, for payments of his debts, and to perform his will, it is to be intended that he hath computed that the profits to be taken of his lands during the minority of his son, would suffice to pay his debts and perform his will, and that he did not intend it should determine by the death of his son; for then the means which he had prescribed to satisfy his debts and perform his will would be defeated, and by consequence his debts would remain unsatisfied and his will unperformed; and therefore this case of a devise doth differ from a lease or a grant made in like manner. For the devisor is intended to be without counsel, and therefore the law will be his counsel. Although the devisor being hindered by sickness or want of good advice, makes his will in a disordered manner, and in barbarous and unfit words, the law in such case will reduce his words which want order into good order, and sentence his unfit words to words sufficient in law, according to his intent which appears by his own words, as was adjudged in *Wellock* v. *Hammond,* [reported ante p. , which Coke here states at considerable length.] Upon which it was concluded by defendant's counsel, that the executors had a good term for 12 years, which was not determined by the death of Hugh; which was granted by the whole court. And the general rule put by counsel of the other side was well agreed, that the remainder ought to commence in possession when the particular estate ends, as well in wills as in grants; but that doth not concern the case at bar; for here, in as much as the term did not end by the death of Hugh, the remainder did begin in possession at the end of the term. As to the uncertainty, it was said, that the case at bar is no other in effect, but that a man devises his lands to his executors for the payment of his debts, until his son shall or should have come to his age of 21 years, the remainder to his son in fee: for although these are adverbs of time, *when,* &c., and *then,* &c., yet they do not amount to make anything precede the settling of the remainder. A man leases land for life or years, and after the decease of the lessee, or the term ended, the remainder to another, yet it shall remain presently; for when these adverbs refer to a thing, which must

of necessity happen, there they make no contingency: and it is certain that every man must die, and every term end. So that these adverbs *then* and *when* in our case, are demonstrations of the time when the remainder to Hugh shall take effect, in possession, as in the said cases of a lease for life and a lease for years, and not when the remainder shall vest; which was granted by the whole court. And judgment was given that the plaintiff should take nothing by his bill.

NAPPER v. SANDERS, in Common Bench, 7 Car. 1, A. D. 1632.—Hutton 118, 5 Gray's P. C. 48.—Abridged.

Ejectione firmae against Henry Sanders, by Robert Napper, as lessee by indenture of Francis Sanders, John Napper, and Elizabeth, John's wife. Plea, not guilty. On special verdict the case was, that, one seised in fee of the land in question, made feoffment of it to the use of herself for life, then to the use of the feoffees for 80 years if Nicholas Sanders and Elizabeth his wife should so long live, and if Elizabeth survive Nicholas, then to her use for life, and after her death to the use of Posthumous Sanders her son in tail, and for default of such issue to the use of Francis and John's wife in tail, remainder to the heirs of the feoffor. The feoffor died, the feoffees entered, Elizabeth Sanders died (Nicholas yet living), Posthumus died without issue, Francis and John's wife entered and were possessed, and defendant entered as son and heir of the feoffor, and ejected them and the plaintiff; whence this action. The sole question was whether the remainders to Posthumus and plaintiff's lessors were vested or contingent.

It was resolved by all the COURT, that the remainders were not contingent in the estate for life which was to come to Elizabeth Sanders, the wife of said Nicholas, but were vested presently. And it was agreed, that the estate for life, if she survive her husband was contingent; and when that had happened, being by way of limitation of an use, it shall be interposed when the contingent happen; as in *Chudleigh's Case* [*ante* —], a feoffment to the use of the feoffor, for life, and after his death to his first son which shall be afterwards born, for his life, and so to divers, and afterwards to the use of J. D. in tail, it is resolved that all the uses limited to persons not *in esse* are contingent, but the uses to persons *in esse* vest presently, and yet these contingent uses when they happen vest by interposition, if the first estate for life which ought to support them be not disturbed. And in this case it was a good estate for life in Margaret [the feoffor], and then gives the remain in the feoffees for eighty years, if Nicholas and Elizabeth Sanders so long should live, and if Elizabeth survive Nicholas, then to Elizabeth for her life, and after her decease to Posthumus in tail, and after his decease to the said three daughters in tail, so that there the estate for years determines upon the death of Elizabeth, and so also the estate for the life of Elizabeth, which was contingent, determines by her death. [After citing and admitting *Lord Derby's Case* Litt. Rep. 370; *Boraston's Case,*

ante —, and others, and distinguishing *Colthirst* v. *Bejushin*, *ante* —, the report proceeds.] And after argument at bar, this term (it being before that the LORD RICHARDSON was there, who was of the same opinion) we all concurred, and judgment was entered for the plaintiff.

EDWARDS v. HAMMOND, in Common Pleas, 35 Car. 2.—A. D. 1683.—3 Lev. 132, 1 B. & P. N. R. 324n., 2 Danv. 16, pl. 12, 5 Gray P. C. 52.

Ejectment, upon not guilty and special verdict, the case was; a copyholder of lands, borough English, surrendered to the use of his eldest son and his heirs, *if he live to the age of 21 years, provided and* upon condition, that if he die before 21, that then it shall remain to the surrenderer and his heirs. The surrenderer died, the youngest son entered, and the eldest son being 17 brought ejectment. And the sole question was whether the devise to the eldest son be upon condition precedent, or if the condition be subsequent, viz., that the estate in fee shall vest immediately upon the death of the father, to be divested if he die before 21. For the defendant it was argued, that the condition was precedent, and that the estate should descend to the youngest son in the mean time; and so the eldest son has no title now, being no more than 17. On the other side it was argued, and so agreed by the COURT, that though by the first words this may seem to be a condition precedent, yet, taking all the words together, this was not a condition precedent, but a present devise to the eldest son, subject to and defeasible by this condition subsequent, viz. his not attaining the age of 21; and they resembled this to the case of *Springe* v. *Caesar*, reported by W. Jones 389, and abridged by Rolle, 1 Abr. 415, *nu.* 12: A fine to the use of B and his heirs if C pays him 20*s.* upon Sept. 10; and, if C pays, to the use of B for life, remainder to C and his heirs, where the word *si* does not create a condition precedent, but the estate in fee vests presently in C, to be divested by payment afterwards. So here. Accordingly this case was adjudged in Mich. term next following.

EXECUTORY DEVISES AND SPRINGING AND SHIFTING USES.
Without Prior Particular Estate.

ANON., 30 Hen. VIII, A. D. 1540.—Brooke Abr. t. Feoffments al Uses 50.

If A covenant with B that when A shall be enfeoffed by B of three acres in D, that then the said A and his heirs and all others seized of the lands of A in S shall be seized of it to the use of the said B and his heirs, then if A make a feoffment of his land in S, and then B enfeoff A of the said three acres of land in D, then the feoffee of A shall be seized to the use of B, notwithstanding that he had no notice of the use; for the land is and was bound by the aforesaid use, into whosesoever hands it might come, and it is not like the case where the feoffee to uses sells the land to one who has no notice of the first use; for in the first-mentioned case the use had no existence until the feoffment of the three acres was made, and then the use commenced.

ASSABY v. LADY ANNE MANNERS, in King's Bench, 32 Henry VIII, 1541 —2 Dyer, 235a.

Memorandum that before the statute of 27 Hen. 8 [c. 10], A was seized of land in fee, and in consideration of a marriage to be had between his daughter (and heir apparent) and B, the son and heir apparent of C, he covenanted and agreed by indenture with C, that he himself would have, hold, and retain, the land to himself and the profits of it during his life, and that after his decease the said son and daughter should have the land, to them and the heirs of their two bodies, and that all persons then or afterwards seized of the land should stand and be seized immediately after the marriage solemnized to the use of said A for term of his life, and after his death to use of said son and daughter in tail as above, and covenanted further to make an assurance of the land before a certain day, accordingly, &c. And then the marriage took effect; and afterwards A bargained and sold the land for 200 marks (of which not a penny is paid) to a stranger, who has notice of the first covenants and use, and enfeoffed divers persons to this last use, against whom a common recovery was had to this last use; and also A levied a fine to the recoverers before any execution had; and notwithstanding all these things A continued in possession in taking the profits during life, and afterwards died. And the son and daughter entered and made a feoffment to their use. And all this matter was found in assize by Assaby and others against Lady Anne Manners in the eighth year of Henry 8 by a special verdict. And judgment was given upon great deliberation in the exchequer chamber, by FINEUX and MOORE, then justices of assize in Surrey, that the entry and feoffment were good, and the use changed by the first indenture and agreement. Yet, 32 Henry 8, error was brought in the king's bench upon this judgment, and the error assigned in point of judgment, *s.* because no use was changed out of A by the first indenture and agreement. But nothing came of it; yet the case was well argued there again; and BROMLEY and HALES were of counsel with the plaintiff in error, and divers defects were moved to the form of the writ of error.

MUTTON'S CASE, in Common Pleas, Hilary, 14 Eliz., A. D. 1572.—Moor 96, 1 And. C. P. 42, pl. 106, Dyer 274.

Jane Mutton brought a writ of entry against Anne Mutton, who pleaded in bar that John Mutton, the father of the said Jane, was seised of the lands in question, and 1 & 2 Phil. & Mary, levied a fine of them to the use of himself and the woman he should afterwards marry, and after their death to the use of said Jane and the heirs of her body; and that afterwards he took to wife said Anne, now tenant, and died; that Jane by color of descent, without any right in possession, entered on said Anne, who re-entered, for which re-entry Jane conceived this action. Jane demurred to the plea. The case was argued by *Jeoffreys* for the plaintiff and *Mead* for the defendant; and the only question in

the case was whether by the limitation of the use to the woman he should afterwards marry, Anne obtained a jointure with John, or was the limitation of the use and estate on this void, for want of a woman in being at the time of the limitation. It was argued on both parts that such an estate limited in possession would be wholly void. But by the limitation of the use in the present case, MANWOOD, MOUNSON, and HARPER, JJ., in their arguments held clearly that the law is otherwise, and that the demandant was barred. DYER [J.], *e contra*. And they all argued *anno* 17 Eliz. in the common bench openly.

With this agree the opinions of three justices in 6 Edw. 6, Brooke, feoffments to uses 30; and 38 Hen. 8, Brooke Assurances; and the case between *Newis and Lark* in Plowden's Com. [*ante* p —] and the case of petition by *Basset* v. *the Queen*, 4 Mary, Dyer [133a, 136a]; and 15 Eliz., in *ejectione firmæ* by *Huddy* v. *Gilbert*.

Before this time the estate was in several cases held not to be joint. A feoffment was made to the use of a man and woman and the heirs of their two bodies, afterwards they inter-married, then the statute of uses was passed, vesting the estate in them as they had the use; and held that they were not joint-tenants, and the wife surviving was entitled to a moiety only; though the statute vested the possession in them at the same time, when they were husband and wife. Bedyll v. Holstoke (T. 3 & 4 Ph. & Mary, A. D. 1556); Fuljambe v. Lyndacre (4 & 5 Ph. & Mary); and Morgan v. Wharton (E. 8 Eliz., A. D. 1566, in Com. Bench); all reported in 2 Dyer 149b, and one in 1 And. 303.

ANONYMOUS, in Common Pleas, Mich. 24 Eliz., A. D. 1582.—Moor 177.

MEAD and PERRIAM, JJ., affirmed that it was adjudged in the time of Lord Dyer, that if lands are devised to two men and to the child with which the wife of the devisor is enceinte that this devise is good; and the child shall take by the devise; but if he should take in common or in jointure the LORD DYER doubted.

HINDE & LYON'S CASE, in Common Pleas, Mich., 19 Eliz., A. D. 1587.—3 Leonard 64.

In debt by Hinde against one as the son and heir of Sir John Lyon; who pleaded: nothing by descent but the third part if the manor of D. The plaintiff replied: assets; and showed for assets that the defendant had the whole manor of D by descent; upon which they were at issue. And it was given in evidence to the jury, that the said manor was holden by knight-service, and that the said Sir John, the ancestor, of &c., by his will in writing [*65] devised the whole manor to his wife, until the defendant his son and heir should come to the age of 24 years; and that at the age of his son of 24 years his wife should have the third part of the said manor for her life, and his son should have the residue; and if that his said son do die before he come to his said age of 24 years without heir of his body, that the land should remain to J. S., the remainder over. The devisor died, the son came to the age of 24 years. The question was if the son had an estate in tail, for then

for two parts he was not in by descent. And it seemed to DYER [C. J.] and MANWOOD [J.] that here was not any estate tail; for no tail shall arise if not that the son die before his said age, and therefore the tail shall never take effect; and the fee simple doth descend and remain in the son, unless that he dieth before the age of 24 years; and then the estate vests with the remainder over. But now, having attained to the said age, he hath the fee, and that by descent, of the entire manor; and then his plea is false, that but the third part descended. And that a general judgment shall be given against him as of his own debt. * * *

YELVERTON v. YELVERTON, in Queen's Bench, Trinity term, 37 Eliz., A. D. 1595.—Cro. Eliz. 401.

Upon demurrer the case was, the father covenanted by indenture in consideration of natural affection, to stand seized of all his lands which he afterwards should purchase, to the use of himself for life, and after to his youngest son and his heirs; afterwards he purchased land and died; and whether the eldest or youngest son should have it was the question. *Bacon* argued for the youngest son, that he should have it, for this covenant shows his intent expressly, and is to work *in futuro;* and therefore good enough: as if a man deviseth lands which he hath not, and after purchaseth them. So if one covenants that he will purchase lands before Michaelmas, and that before Easter following he will levy a fine of these lands which shall be to such uses, and he levies a fine, and doth not limit any uses, it shall be according to the covenant before the purchase: *quod fuit concessum per* CURIAM, for they shall be as uses declared upon that fine whereof he showed his intent before. But in the principal case the court held, that this covenant vests nothing in the younger son; and is not sufficient to vest any use in him of this land; for a man cannot by a covenant raise an use out of land which he hath not; for no more than a man may charge, let, or grant a thing which he hath not, no more may he limit an use out of land which he hath not. Also, upon every feoffment or purchase, the feoffor or donor, from whom the land passeth, is to limit the uses to the feoffee or purchaser; then before the purchase one cannot limit how the use shall be, viz., that it shall be to his youngest son, where the feoffor hath limited it to the use of him and his heirs, which should be to limit an use out of an use, which the law will not suffer. Therefore judgment was given accordingly for the eldest son. And here a case was cited in 20 Eliz.; but neither the name nor in what court was mentioned, that a mortgagor entreated a stranger to redeem the land at the day, and covenanted by indenture that after such redemption the stranger should have the land to him and his heirs and that he in consideration of such a sum would stand seized to the use of him and his heirs; the stranger redeems the land at the day, the mortgagor enters, the deed is enrolled within the six months; yet ruled that nothing passed, because he had not any estate or interest therein at that time to contract for it.

WOODLIFF v. DRURY, in B. R., 37 & 38 Eliz., A. D. 1597.—Cro. Eliz. 439.

Trespass. After verdict, *Coke,* Att. Gen., moved in arrest of judgment. The case on the pleadings was, that one made a feoffment, and it was declared in the indenture that it was to the use of himself and A, his feme that should be, after their marriage, and of the heirs of their bodies; and he took A to feme. Whether she should take by the limitation of this use was the question. And he moved that she should not: for presently by this feoffment the fee is in the baron by the possession, executed to the use which he had before the marriage; which cannot after the marriage be divided and made an estate tail in him; for he had the fee in him until the marriage; for it might have been that the marriage had never taken effect, and that would have confounded the other use; and uses *in futuro* shall not rise on such future acts; for then an use should rise out of an use. [*Tyrrel's Case*] Dyer 155.

But All the Justices held, that although he be seised in fee in the meantime, as in truth he is; yet by the marriage the new use shall arise and vest, if there be no act in the meantime to destroy that future use (as it was in *Chudleigh's Case,*) according to the limitation of the use. And judgment was given accordingly for the plaintiff.

PAY'S CASE, in Queen's Bench, Easter, 44 Eliz., A. D. 1602.—Cro. Eliz. 878.

Upon a special verdict the case was, that one devised his land to J. S. from Michaelmas following for five years, remainder after to the plaintiff and his heirs. He [testator] died before Michaelmas: The question was whether this were a good remainder, because it could not enure instantly by his death. For it may not begin until the particular estate, which is not to begin till after Michaelmas, and a freehold cannot be in expectancy. But ALL THE COURT held, that it very well might expect; for in case of a devise, the freehold in the mean time shall descend to the heir, and vest in him. Wherefore, without argument, it was adjudged accordingly, and that the remainder was good.

HOPKINS v. HOPKINS, in Court of Chancery, 1734.—Cas. Tem. Talb. 44, 5 Gray's P. C. 168, Gate's Cas. R. P. 221.

The testator, Mr. Hopkins, by his will, devises his real estate to trustees and their heirs, to the use of them and their heirs, in trust for Samuel Hopkins (the plaintiff's only son, which plaintiff is heir at law to the testator) for life; and from and after his decease, in trust for the first and every other son of the body of the said Samuel, lawfully to be begotten, and the heirs male of the body of every such son; and for want of such issue, in case the said John Hopkins, the plaintiff, should have any other son or sons of his body lawfully begotten, then in trust for all and every such son and sons respectively and successively, for their

respective lives, with remainders over, then in trust for the first and every other son of his cousin Anne Dare (wife of Francis Dare) lawfully to be begotten, with like remainders to the heirs male of the body of every such son of the said Anne Dare; and for default of such issue, then in trust for his own right heirs forever.

Samuel Hopkins died in the testator's lifetime, without issue; and some time after, the testator died without any alteration made of his will; nor had John Hopkins any other son; nor were any of the other remaindermen *in esse* at the testator's death, except Dare, son of Anne Dare.

The cause was first heard at the rolls, and there decreed to be an executory devise.

TALBOT, Lord Ch. Two questions have been made upon this will: The first is, whether this limitation to the first and every other son of John Hopkins can now take effect as an executory devise? or whether it shall be taken as a contingent remainder, and consequently void for want of a particular estate to support it, by reason of Samuel's death in the testator's lifetime, and that John Hopkins had no son *in esse* at the testator's death, in whom the remainder might vest? The next question is, in case the limitation be taken as an executory devise, what is to become of the rents and profits of this estate until John Hopkins has a son? As to the first, I think it impossible to cite any authorities in point. None have been cited. It seems to be allowed, that if things had stood at the testator's death as they did at the time of the making of the will, the limitation in question would have been a remainder, by reason of Samuel's estate, which would have supported it. So is the case of *Purefoy* v. *Rogers,* 2 Saund. 380, 388, and limitations of this kind are never construed to be executory devises but where they cannot take effect as remainders. So on the other hand, it is likewise clear, that had there been no such limitation to Samuel and his sons, the limitation must have been a good executory devise, there being no antecedent estate to support it; and consequently not able to inure as a remainder; so that it must be the intervening accident of Samuel's death in the testator's lifetime, upon which this point must depend. And as to that, I am of opinion that the time of making the will is principally to be regarded in respect to the testator's intent. If an infant or feme covert make a will, and do not act either at full age or after the coverture determined, to revoke this will, yet the will is void, because the time of making is principally to be considered; and the law judges them incapable of disposing by will at those times. The same reason holds in the case of a devise of all the lands which a man has or shall have at the time of his death, no after-purchased lands shall pass without a republication, which was the case of *Bunter* v. *Cook,* 1 Salk. 237, because the time of the will made is chiefly to be regarded. Indeed it is possible that subsequent things may happen to alter the testator's intent; but unless that alteration be declared, no court can take notice of his private intent, not manifested

by any revocation of the former; though these subsequent accidents may and must, in many cases, have an operation upon the will; as in the case of *Fuller* v. *Fuller,* Cro. Eliz. 422, [*ante* —], and *Hutton* v. *Simpson,* 2 Vern. 722. And in the *Lord Landsdown's Case,* 10 Mod. 96, the first limitation did not expire by effluxion of time, but by the intervening alteration of things between the time of the will made and the testator's death; and the words there, *for want of such issue,* were not construed to create another estate tail to postpone the limitation, but only to convert the second estate to the precedent limitation. So we see, that in these cases the method of the courts is not to set aside the intent because it cannot take effect so fully as the testator desired; but to let it work as far as it can. And if, in this case, we consider it as an executory devise, the intent will be served in case John Hopkins has a second son; but if it is taken as a remainder, the intent plainly appearing that a second son of John Hopkins should take, is quite destroyed; there being no precedent estate to support it as a remainder. The very being of executory devises shows a strong inclination, both in the courts of law and equity, to support the testator's intent (*Doe* v. *Fonnereau,* 2 Doug. 487) as far as possible; and though they be not of ancient date, yet they are of the same nature with springing uses, which are as old as uses themselves. I can see no difference between this case and the others of like nature, that have been adjudged. And if such a construction may be made consistently with the rules of law, and agreeable to the testator's intent, it would be very hard not to suffer it to prevail. In *Pay's Case,* Cro. Eliz. 878 [*ante* p.], had the testator lived to Michaelmas, the limitation had been a remainder; and if a remainder in its first creation does, by any subsequent accident, become an executory devise, why should it not be good here, upon the authority of that case, where by the testator's death before Michaelmas, what would otherwise have been a remainder, was held to be good by way of executory devise? I think, that in this case the limitation would operate as an executory devise, if it was of a legal estate; and therefore shall do so as a trust, the rules being the same.

The next question is, what is to become of the rents and profits, in case this be taken to be an executory devise, until the birth of a son to John Hopkins? * * * Until somebody is *in esse* to take under this executory devise, the rents and profits must be looked upon as a residue undisposed of, and consequently must descend upon the heir-at-law; the case being the same where the whole legal estate is given to the trustees, and but part of the trust disposed of, as in this case; and where but part of the legal estate is given away, and so the residue undisposed of, the legal estate descends upon the heir-at-law. So it was held by the Lord King in the case of *Lord and Lady Hertford* v. *Lord Weymouth* —which shows that equity follows the law.

One objection indeed has been made, which is, that the testator having in this case devised another estate to John Hopkins, his heir-at-law, can never be supposed to have intended him this surplus. And to war-

rant that objection, the case of *North* v. *Crompton,* 1 Ch. Cas. 196, has been cited. I answer, that in these cases the heir does not take by reason of the testator's intent being one way or the other; but the law throws it upon him: and wherever the testator has not disposed (be his intent that the heir should take or not take), yet still he shall take, for somebody must take; and none being appointed by the testator, the law, throws it upon the heir. * * * Decree affirmed.

GORHAM v. DANIELS, in Vermont Sup. Ct. June, 1851.—23 Vt. 600.

Trespass *quare clausum fregit.* Amaziah Richmond, being well seised in fee of the land in dispute, made a deed "meaning to convey one half of the above described land, * * * and the other half not to come into possession of it not till after my decease, Amaziah Richmond's and Sarah Richmond's decease; it is meant to convey the whole of the above land after the decease of Amaziah Richmond and Sarah Richmond." The consideration expressed was $750. The grantee was the son of Amaziah and Sarah, went into possession on execution of the deed, and later borrowed money and gave a mortgage on the land, which was foreclosed on default, and plaintiff claims under the foreclosure decree. Plaintiff being in possession, defendants entered, claiming under Sarah, widow of the grantor. It was agreed that if Sarah then had title or right of entry, defendant should recover costs; otherwise judgment should be for plaintiff for $8.00 damages and costs. The county court gave judgment for plaintiff and defendant excepts.

REDFIELD, J. This case has been twice argued, and mainly upon the question how far the statute of Henry 8 of England, called the Statute of Uses, is to be considered in force in this state. It seems to me very much to be regretted, that so important a question should have come to a final determination in a case so utterly insignificant in pecuniary consequence. But I have given my best attention to the subject, during the two arguments, and notwithstanding, it seems to be conceded, that the Statute of Uses is considered in force in most of the other American states, and would answer a good purpose, in many cases, in effecting, at law, the real intention of the parties, without the necessity of a resort to a court of equity, and the farther consideration, that it is known, that the late Mr. Justice Thompson of the United States supreme court, while presiding in the circuit court, in this state, upon argument, and after a deliberate consideration, in a written opinion of considerable labor, decided that it was in force here, still I cannot bring my mind to that conclusion. See 1 Greenlief's Cruise, 349, and the learned editor's elaborate note upon the subject, where the matter is fully discussed.

But so far as the conveyance of lands, in this state, is concerned, it seems to me, that our statutes are fully adequate to all the ordinary incidents of the subject; and that in those extraordinary occasions where the statute of uses might answer a good end, it will be safer and better

every way, to have resort to a court of equity, than to introduce a portion of the ancient common law system of conveying real estate, most of the incidents of which have been materially modified, even in England. Since the separation of this country from that, it would become necessary immediately to resort to very extensive legislation, in order to render this addition to our present laws even tolerable. [*610]

This view is certainly confirmed by the history of our jurisprudence on this subject. Nothing ever existed in the history of this state, calling, in the slighest degree, for the use of such a statute, except in those cases, where, by some mistake, the parties have failed fully to effect their intention in the prescribed mode. The Statute of Uses would no doubt aid somewhat this class of cases. But its original purpose and design had not the remotest bearing, or purpose in that direction even. And to adopt a portion of a system of laws, which will in its train, very likely, draw in the whole, for the mere purpose of effecting some collateral purpose in a particular cause, seems almost absurd.

We entertain no doubt, that our system of conveyancing, so different from the English, so simple and intelligable to all, and so intended to be, by means of a thorough system of registry, from the very first, was designed to be entire in itself. And although most of its terms, and many of its forms of deeds even, like that of bargain and sale, derived their meaning and operation to some extent, from the common law and the English statutes, and that of uses among others, yet it was no doubt the purpose of the framers of our laws upon conveyancing to have them "understanded" of the people, without the necessity of resorting to the study of the subject in other quarters. Such has been the practical construction of the subject by all, professional or unprofessional, ever since. With rare exceptions the profession in this state have never supposed any of the common law modes of conveyancing to be regarded as in force here. The attempt to bar an entail in this state by a common recovery or the rights of a married woman by a fine would, I think, strike the profession with some surprise. * * * [*611] * * *.

The granting of an estate in fee, to take effect after a particular estate reserved, as an estate for life, or lives, is not inconsistent with the law of England. And if it were, it could have no application here; for under our statute of conveyancing, there being no livery of seisin in fact necessary to invest the grantee with the title, but only the seisin resulting from the due execution and recording of the deed, there is no objection whatever to the creating of a freehold estate, in terms, to take effect in future. This has been expressly decided in some of the American states and we see no valid objection to holding the same under our statute.

WARDWELL v. BASSETT, in Rhode Island Supreme Ct., March, 1866.—8 R. I. 302.

Trespass and ejectment for possession of land and buildings in Providence. Defendants claim under the deed of Chloe Bassett, *habendum* to Amey Bassett and her heirs to her and their sole use and benefit "from and after the day of my decease." Plaintiff claims under the grantor's will.

BRADLEY, C. J. The question in this case arises upon the construction of a quitclaim deed made in the common form under our practice, with the *habendum* providing that it shall not take effect till after the decease of the grantor. This is not an unusual mode of conveyance in this and other New England states, and is, upon the face of it, open to the objection of attempting to create an estate in fee *in futuro*. It is a duty of the court, of course, to sustain the intention of the parties if upon any legal grounds it can be sustained. [*305]

The language of the instrument may be construed as a covenant to stand seised, as the intention is clear, and as, upon inquiry, we find that the relations of the parties to this deed are such as to furnish a sufficient consideration; for it is admitted in the case, though not upon the face of the deed, that the grantor was the mother of the husband of the grantee, by whom he had children. The case of *Wallis* v. *Wallis*, 4 Mass. 135; *Gale* v. *Coburn*, 18 Pick. 397; *Bell* v. *Scammon*, 15 N. H. 381, 41 Am. Dec. 706, are strictly analogous to this case, upon the point here decided. See also *Byron* v. *Bradley*, 16 Conn. 473. It is unnecessary to consider whether the deed could be sustained upon other grounds. Judgment for the defendant.

FERGUSON v. MASON, in Wisconsin Sup. Ct., April 15, 1884,—60 Wis. 377, 19 N. W. 420.

Ejectment to recover undivided third interest in land. John Ferguson, Sr., conveyed the land to defendant by deed "in consideration of one dollar and love and affection." The deed contains the clause: "The party of the first part reserves the sole, free, and absolute use and control of all the above described lands so long as he and his wife, or either of them, may live." The grantor and his wife are dead, and the parties and one Margaret are the only heirs. On the death of her father, defendant went into possession and entirely excluded the plaintiff. From judgment for defendant plaintiff appeals.

LYON, J. Laying aside the question of homestead for the present, it is necessary first to determine whether a conveyance of land by the owner thereof in fee is valid in which it is stipulated that the grantor shall have the possession and absolute use and control of the land during his life.

In very many of the older cases the courts, out of tender regard to the subtle and technical distinctions and niceties of the common law rules

respecting the tenure and alienation of real estate, seem to have held that if such a conveyance be regarded as a feoffment, or bargain and sale, it could not be upheld. The reason given was that the effect of the exception or reservation therein contained was to retain the whole estate in the grantor during his life, and to uphold the conveyance would be to violate the rule that a freehold cannot thus be created to commence *in futuro*. So those courts upheld such conveyances on the ground that a covenant might be implied from their terms, on the part of each grantor, to stand seised of the lands to his own use during his life, and, after his decease, to the use of the grantee and his heirs. Hence upon the execution of the deed, the grantor was tenant for life, and a remainder in fee was vested in the grantee. Thus, those courts were strictly loyal to the common law rules which grew out of tenures that never obtained in this country to any great extent, and at the same time gave judgments which are clearly reasonable and just. Many of the cases above referred to are cited in the briefs of the respective counsel. Such conveyances cannot, however, be upheld in this state on any implied convenant, or on the doctrine that the grantor stands seised to the use of the grantee, for our statutes long since abolished both implied covenants and such uses. Rev. St. 1858, c. 84, § 1; Id. c. 86, § 5; Rev. St. §§ 2071, 2204. But we think they may be upheld on other grounds.

The statutes recognize and define future estates in expectancy as follows: "A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise of a precedent estate created at the same time." Rev. St. 1858, c. 83, § 10; Rev. St. 1878, p. 614, § 2034. At common law the intervention of a precedent estate, created at the same time, was essential to the validity of a conveyance of an estate of freehold, to commence at a future time, which is an estate in remainder. It was said that without such precedent estate there could be no valid remainder. The reason was (and it was conclusive to the minds of our English ancestors) that unless a precedent estate was created there could be no livery of seisin to support the remainder; and without livery of seisin, no estate of freehold could be created. After laying down the rule and giving the reasons therefore above suggested, Blackstone informs us how the future expectant estate, that is, the remainder, may be created. He says: "So, when it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred till a future time, it is necessary to create a previous particular estate, which may subsist till that period of time is completed; and for the grantor to deliver immediate possession of the land to the tenant of the particular estate, which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same estate in law. * * * The whole estate passes at once from the grantor to the grantees, and the remainder man is seised of his remainder at the same time that the termor is possessed of his term. The enjoyment of it must, indeed, be deferred till hereafter; but it is, to all intents and

purposes, an estate commencing *in presenti,* though to be occupied and enjoyed *in futuro.*" 2 Bl. Com. 165. But this refined doctrine of the necessity to create a particular estate to support a freehold estate to commence at a future time, has been overturned by the statute above quoted. Similar statutes prevail in a large number of the states of the Union. These are referred to in 2 Washb. Real Prop. 265 (4th ed. 592).

Conveyances of land containing exceptions or reservations, similar to that in the conveyance under consideration in the present case, are very common, and always have been in general use in this country, as reports of judicial decisions abundantly show. Because of this fact, some courts, in the absence of statutory provisions on the subject, have held such conveyances valid, without much regard to any other ground upon which their judgments might have been placed. This is notably true of the supreme court of Connecticut. *Barrett* v. *French,* 1 Conn. 362; *Fish* v. *Sawyer,* 11 Conn. 545; *Bissell* v. *Grant,* 35 Conn. 288.

Our constitution thus ordains: "All lands within this state are declared to be allodial, and feudal tenures are prohibited." Art. 1, § 14. That is to say, the owner of land in this state holds the same of no superior. He has absolute dominion over it, owing no rent, service, or fealty to any, on account thereof. His obligation of fealty to the government is an obligation arising out of his citizenship, and is no greater or different because he is a proprietor also. Even the government may not condemn his land to the public use without paying him a just compensation therefor. Why has not the owner of land, held by a tenure so absolute, the right to convey it on such terms and under such restrictions as he chooses to impose, so long as he contravenes no public policy or positive rule of law? And what policy or rule of law is contravened, if, instead of making his conveyance take effect immediately, he stipulates that it shall take effect at the end of a month, or a year, or on the happening of some future event? We should be strongly inclined to uphold that right as a necessary incident to allodial tenure, were there no statute expressly conferring it. The conclusion is inevitably, that, if otherwise sufficient, a conveyance of land in fee, to take effect at a future time, is valid, and will vest the fee in the grantee according to the terms of the conveyance. * * *

In conclusion it is but just to say that the case was argued by learned counsel for both parties with great ability, and their learning and research have been of much value to us in determining it. The judgment of the circuit court must be affirmed.

Statute of New York, Mich., &c. "A freehold estate as well as a chattel real may be created to commence at a future day." **N. Y.** R. S. (1828), pt. 2, c. 1, t. 2, Art. 1, § 24; **Mich.** R. S. (1846), c. 62, § 24, C. L. (1897), § 8806; **Minn.** St. (1866), c. 45, § 24, R. L. (1905), § 3213; **Wis.** R. S. (1849), c. 56, § 24, St. (1898), § 2048.

A Fee After A Fee.

ANON., in Common Bench, Easter, 28 and 29 Hen. 8.—A. D. 1538.—1 Dyer 33a.

The custom of London is that a man may devise his purchased lands in mortmain. And a purchaser devised by his will, that the prior and convent of St. Bartholomew in West Smithfield and their successors should have the lands, so as they paid annually to the dean and chapter of St. Paul sixteen marks; and if they should fail of payment, that their estate should cease, and that the said dean and chapter and their successors should have it. And for a breach of the condition, they of St. Paul entered. And to FITZHERBERT [J.] and BALDWIN [C. J.] it seemed clear, that the condition is void; for it cannot continue after the fee-simple given, for the feoffor has determined his right and interest, and then the stranger cannot enter for the condition broken, but the heir may.

In speaking of this case in Gardner v. Sheldon, Vaughn 271, Judge Vaughn said Baldwin and Fitzherbert were the greatest lawyers of their age. Fitzherbert was the author of the Abridgment.

In Trinity, 19 Hen. 8, A. D. 1529, Fitzherbert, J. said: "If a man devise land to H in fee, and if he die without heir that M shall have the land, this devise is void as to M; for a fee-simple cannot depend upon another fee-simple by the law."

This point was made a question in 2 & 3 Ph. & Mary, A. D. 1553, on a devise in fee by a debtor to his sons on condition to pay his debts, devise over to an uncle on like condition; and the first devisees failed to pay, and the second died without payment, and whether his heir could enter for the condition broken and make payment? But no decision reported. Wilford v. Wilford, Dyer 128a.

ANON., 6 Edw. 6, A. D. 1553.—Brooke Abr. t. Feoffments to Uses, pl. 30.

Note, if a man made a feoffment in fee before the Statute of Uses, 27 Hen. 8, c. 10 (or after this statute), to the use of W and his heirs till A pay 40£ to W, and then to the use of A and his heirs; and afterwards the Statute of Uses is passed and executes the estate in W, and later A pays to W the 40£; by the majority, A is seized in fee if he enters. It was held by others that A should not be seized in fee by the said payment unless the feoffees enter. *Quære.* And the same would seem to be his right to enter in name of the feoffees and in his own name; and then one way or the other the entry would be good, and A would be seized in fee. And also it would seem that a man at this day may make a feoffment to use, and that the use may change from one to another by act *ex post facto* by circumstances as well as before the Statute of Uses, 27 Hen. 8, c. 10.

HARWELL v. LUCAS, Hilary, 14 Eliz., A. D. 1572.—Moor 99, 1 Leon. 264.

Replevin by Thomas Harwell against William Lucas. Thomas Bracebridge, seised of the manor of K in Warwick county, made a lease

for 21 years of six acres of the manor to Thos. Moore without rent, and afterwards he made a lease of the said six acres to John Curtes for 26 years to commence after the first lease expired, rendering certain rent; and afterwards he made a feoffment of the manor and all other his lands, to the use of the feoffees and their heirs, on condition that if they do not pay 10,000£. within fifteen days to Thomas Bracebridge or his assigns, then they shall be *seised* to the use of said Thomas and Joyce his wife, remainder to Thomas their second son in tail, with divers remainders over, remainder to the right heirs of said Thomas the father. Livery was made of the land in possession only, and nothing in the six acres; the money was not paid; and afterwards the first lessee for years attorned, Thomas Sr. and wife died, the first lease expired, the second lessee died, his wife being executor married Lucas, and Harwell the plaintiff distrained the cattle of Lucas for rent arrear, as bailiff of Thomas Bracebridge the son. The case was argued at bar and bench, and at last adjudged for the defendant.

For although they held that the reversion of the six acres did not pass by the livery of the manor without attornment, yet they held that the attornment of the first lessee was sufficient; and also that although the use limited to the feoffees and their heirs was determined before the attornment, yet the attornment was good so as to pass the reversion to the subsequent contingent use; and so the title of Thomas Bracebridge the son to the rent was good, and the conusance of the defendant his bailiff was sufficient.

This is given by Cruise as the second case of a shifting use decided after the passage of the Statute of Uses, the first being reported in Brooke Abr. feoff. al Use pl. 30, and he adds: "It is observable that these cases were prior to that of Chudleigh [*ante* —] so that the doctrine of a possibility of entry or scintilla juris was not then established. But since Chudleigh's Case it is settled that all contingent uses must arise out of the seisin of the covenantors, feoffees, or releasees to uses, and not out of the seisin of any prior cestui que use." 2 Cruise's Digest *356.

HOE v. GERILS, in B. R. 33 & 34 Eliz., A. D. 1592—as stated by Chamberlaine in argument in Palmer 136.

One devised to A and his heirs; proviso that if he die within age that the remainder to another: Adjudged a good remainder; for as he had only a limited fee, a contingent fee may depend on it; but this by way of executory devise, not remainder.

SOULLE v. GERRARD, in C. B., Mich. 38 & 39 Eliz.—A. D. 1597, Cro. Eliz. 525. Abridged from Croke.

Ejectione firmae. Upon not guilty pleaded, a special verdict found, that Richard Baker seised in fee of land held in socage, devised it to his son Richard and his heirs for ever, and if he died within age of 21 or without issue, then the land should be divided equally amongst his three other sons. The devisor died; Richard the son had issue Mary, and died

within age; the other sons entered, and let it to the plaintiff; and the defendant, by Mary's command, ousted him. *Glanville,* for the plaintiff, argued that *or* cannot be taken for *and;* and that while a remainder limited after a fee is held void at common law, as in 19 Hen. 8, pl. 8, and 29 Hen. 8, 1 Dyer 33, [*ante* —] it might well be under the statute of wills 32 Hen. 8. c. 1; for the statute gives liberty to every owner to dispose of his land by devise at his will and pleasure; and as a remainder may be limited to depend on a fee by act of parliament, so it may by will, which is to be so construed. And this is the opinion of *Monson* in [*Newis* v. *Lark & Hunt* 2] Plowden 413 [*ante* —].

ANDERSON, [C. J.] The words of the act of parliament, that "he may dispose at his will and pleasure," are not to be construed so largely as has been said; but he may dispose at his will and pleasure, so as it be according to the rules of law, otherwise it is a vain will. And if other construction should be made thereof, there would be many absurdities ensue thereupon. In this case if the limitation had been single, viz., *if he died without issue, then,* &c., it were plain that it was an estate tail; for that shows what heir ought to have it, and explains the former limitations and is not repugnant thereto. And I conceive that this part of the limitation, "If he die within age," is utterly void; for a remainder cannot depend upon a fee; and then it is all one as if the limitation had been single, "if he die without issue," so Richard had an estate tail, which descended to his daughter, and so the defendant's entry was lawful. Wherefore, &c. [The opinions of WALMSLEY, BEAUMOND, and OWEN, JJ., agreeing with ANDERSON, C. J., are omitted.] And it was adjudged for the defendant.

A fee on a fee by devise was held valid in Wellock v. Hammond (1591), Cro. Eliz. 204, ante, , under conditions.

A marginal note in 2 Dyer 127a of an anonymous case in 23 Eliz. (1581) has been cited as the first case of an executory devise. This marginal note is as follows: "A devises land to his mother for life, and after her death to B in fee; provided that if his wife (who was then enceinte) should be delivered of a son, that then the lands should remain to him in fee. The testator died, and a son was born. It was held that this proviso does not destroy the mother's estate but only B's." The student is requested to compare this with the case of Loddington v. Kime, *ante* —, and Cogan v. Cogan, *ante* —, to determine whether it really involves an executory devise or two alternative remainders in fee. It is further worth observation that the validity of the gift over against B's estate appears not to have been the question before the court.

Soulle v. Gerrard was effectually and permanently overruled by Pells v. Brown (1620), *post* —.

PLUNKET v. HOLMES, in King's Bench, 13 Car. 2, A. D. 1661.—1 Lev. 11, 2, L. Raym. 28, 1 Sid. 47, 1 Keb. 29, 119, 5 Gray P. C. 50. Given according to Levin.

In ejectment, not guilty was pleaded and a special verdict found, on which the case was, a man seised in fee devised the land to his eldest son Thomas *for life,* and if he dies without issue living at the time of his death, to Leonard, another son, and his heirs; but if Thomas had

issue living at his death, that then the fee should remain to the right heirs of Thomas forever. Thomas enters after the devisor's death, and suffers a common recovery, under which the defendant claims, and dies without issue. Two questions were made; 1, if by the will Thomas had only a life estate, with a contingent remainder to Leonard, or whether the fee was vested in Thomas, with an executory devise to Leonard; 2, if it be an executory devise to Leonard, if the common recovery has barred it. For the plaintiff it was argued, that Thomas had the fee, for though only an estate for life be devised to him, yet by descent the whole fee was in him, which merged his estate for life, and this is executed in him; and then the estate to Leonard cannot be any other than an executory devise; for when the whole fee is given or vested in one person, with a limitation of a fee to another upon a contingency, this cannot be a remainder, for one fee cannot remain (*12) upon another, but of necessity must take effect as an executory devise. But when part of an estate is disposed of, as for life or in tail, and the residue given to another on a contingency, as to the right heirs of J. S. who is in life, or to such a person as shall be living in the house at such a time, this is a contingent remainder. But here the whole estate is in Thomas, either by the devise or by descent, and then the devise to Leonard must of necessity be an executory devise, which being to happen within the compass of a life, has been allowed, as in *Pell* and *Brown's C*ase, 2 Cro. [*post* —]. And as to the second question they also relied on *Pell* and *Brown's* Case, where it was adjudged that a recovery shall not bar in such a case. But on the other side it was argued, and so resolved by the WHOLE COURT in Michaelmas term, 13 Car. 2, that Thomas took but an estate for life by the will, and the remainder to his heirs not executed; and though he be the heir, to whom the reversion descends, that shall not drown the estate for life contrary to the express devise and intent of the will, but shall leave an opening, as they termed it, for the interposing of the remainders when they happen to interpose between the estate for life and the fee; and they compared it to *Archer's Case*, 1 Coke 66 [*ante* —]; where though Robert the devisee for life was heir, yet the remainder to his next heir male was contingent, and so not an estate for life merged by the descent of the reversion. And so the estate of Thomas here being only for life, by this devise the remainder to Leonard was a contingent remainder, and barred by the recovery. And then the second point will not come in question, whether an executory devise shall be barred by a common recovery. But on the first point, they all gave judgment for the defendant.

JONES v. ROE, in King's Bench, Hilary term, 29 Geo. III, A. D. 1790.—3 Term 88.

On special verdict in ejectment the question was whether the right of Joseph T. Lockyer by virtue of an executory devise in the will of his father's uncle passed by virtue of Joseph's devise of "all such worldly estate, of what nature or kind soever, whether in possession, remainder,

or reversion, that I shall die seized or possessed of, interested in, or entitled to," &c.

The court of common pleas, after two arguments at the bar, gave judgment for the plaintiff; on which the defendant removed the record into this court by writ of error. *Jekyll,* for the plaintiffs in error, made two points: 1, that this was not a vested interest in Joseph, which the other side conceded; and, 2, that if it was contingent it was not devisable. The court of common pleas determined the case on the authority of *Selwin* v. *Selwin,* 2 Burrow 1131, and *Moor* v. *Hawkins,* in chancery in 1765 before Lord Northington; and Mr. Jekyll contended that these cases will not be found on examination to warrant the conclusion in opposition to all the older authorities.

Lord Kenyon, C. J.: It is high time that this question should be understood to be completely at rest: It affects a great deal of the real property in this country; and miserable indeed would be the state of property, if such a question as this still remained unsettled. If we consider the statute of wills, which first gave a power of disposing of real property by devise, it is a matter of astonishment that this question should ever have arisen. For it enables persons *having* any manors, lands, &c., to devise; which must mean *having an interest* in the lands. There are two kinds of possibilities; the one, a bare possibility; that which the heir has from the curtesy of his ancestor, and which is nothing more than a mere hope of succession. Such a possibility undoubtedly is not the object of disposition; for if the heir were to dispose of it during the life of the ancestor, though it afterwards devolved on him from his ancestor, such disposition would be void. The other, a possibility, or contingency, like the present, and which is widely different from the former. Now in order to see whether this sort of contingency be or be not devisable, let us consider some of the analogous cases. Suppose an estate be limited to A. for life, remainder to B. for life, and that the ultimate reversion in fee was given to another; it never was doubted but that such a reversion was devisable. That was not doubted by Lord Chief Justice Holt, in *Broncker* v. *Coke,* 2 Eq. Cas. Abr. 296, 3, nor in *Brett* and *Rigden,* Plowd. Com. 341 [*ante* —]. But it is said that this, which depended on an executory springing use, is not the subject of a devise. Undoubtedly the statute of wills had been passed some time before any questions arose on executory devises; for they took rise in Queen Elizabeth's time, and arose very rarely for some time afterwards. When they did, it was decided by degrees that they were descendible, releasable, and assignable; but it is contended that they were not devisable. But it is difficult to assign any reason why they should be capable of disposition by [*94] one mode of conveyance and not by another. It is said that a *chose* in action is only assignable in equity; but equity will only interfere when a person claims for a valuable consideration paid, and not between volunteers: And in those cases *equitas sequitur legem.* This question, however, does not depend upon reason by analogy to other cases, or on abstract reasoning. I will not cite all

the cases that may be mentioned upon the subject, but will confine myself to two or three which have been determined by great authorities after much consideration. The first I take from the argument in *Selwyn* v. *Selwyn,* 1 Wm. Black. 225, by Mr. Norton, is that of *Goodtitle* d. *Gurnel* v.*Wood, Tr.* 14 *Geo.* 2, *C. B.* In that case there was a devise to A. and if he dies before 21, then to B. and his heirs: B. died, and then the contingency happened by the death of A. before 21. WILLES, C. J., said: "The question is, whether an executory devise be transmissible. Most of the old cases, which hold that they are not devisable, were before executory devises were well established: but that doctrine is now exploded. Executory devises are not naked possibilities, but are in the nature of contingent remainders; and there is no doubt but that such estates are transmissible, and *consequently devisable.*" Here then the chief justice gave a clear opinion that a possibility was devisable. That it is also transmissible appears from the cases of *King* v. *Withers,* Cas. Temp. Talb. 117, and *Marks* v. *Marks,* 1 Str. 132. And the case of *Selwin* v. *Selwin,* 1 Wm. Black. 225, is a very strong authority on the question in this case. I have a much fuller note of that case than that in Burrow or Blackstone, and the grounds of the opinion of the court, as supposed by Sir *J. Burrow,* are those which Lord *Mansfield* actually declared in court. The case of *Moore* v. *Hawkins* is also a pointed and strong authority on this subject; a manuscript note of which I lent to the court of common pleas when this very case was before them. And it is to be remembered that all further argument of the case of *Moor* v. *Hawkins* was given up by the solicitor general (*De Grey*), who would not have given up the point if he had thought it tenable. On the authority therefore of these cases, I think the judgment of the court of common pleas must be affirmed; and I sincerely hope that this point will be now understood to be perfectly at rest.

[*95] ASHHURST, J.: The court of common pleas considered this as a decided case; and therefore they did not think it necessary to go at large into the grounds on which their opinion was formed. It is now too late to raise any doubt upon this question, it having been expressly determined in the cases of *Selwin* v. *Selwin,* and *Moor* v. *Hawkins.* Were it necessary to go fully into this point, there would be no difficulty in shewing that it was decided in those two cases on sound and legal principles. And there are also several other cases, which, though not on the same point, go the length of supporting the doctrine, that contingencies like the present are devisable. It was held in some of the cases that an interest of this kind is assignable, in others that it is transmissible, and that it is an hereditament; and if so, it follows that it is also devisable. The doubt appears to have arisen on the word "having" in the statute of wills: and the old cases determined that a contingency like the present was not the subject of a devise. But that doctrine has been exploded in all the modern cases. And it is strange that in former times the courts should have been governed by such narrow reasoning, when they were construing this act of parliament. For the plain mean-

ing of the statute is, that every person who has a valuable *interest in lands* shall have the power of disposing of it by his will. However, on the authority of those cases in which it has been decided that a contingent interest like the present is assignable, and transmissible, and of *Selwin* v. *Selwin,* 2 Burr. 1131, and *Moor* v. *Hawkins,* in which this very point was expressly determined, I am of opinion that the judgment must be affirmed.

BULLER, J.: The short question is, whether the interest which a person takes by virtue of an executory devise, be or be not devisable. From the time when executory devises were first known in the law, they have been attacked in every possible shape: and yet it is observable that the attack has, as often as it has been made, in modern times at least, always failed. The true reason why they have been thus attacked is to be found in every modern case which treats of the subject, namely, that in early times when the question was first discussed, the nature of an executory devise was not understood. It was first contended, that an executory devise was not transmissible; then, that it was not assignable; then, that it was not descendible; and, lastly, that it was not devisable. But if it be such an interest as is descendible, it seems strange to say that [*96] it is not also devisable. They must both be governed by the same principle. It was held to be descendible, because the person taking it has an interest in the lands which is known to the law, and will descend if the ancestor does not dispose of it: then if he has that interest, he has a right to dispose of it by will. It is a sound distinction, which has been taken by my Lord Chief Justice, between a *bare* possibility, and a possibility *coupled with an interest.* The cases on this subject have been uniformly determined the same way for nearly fifty years past. The case of *Goodtitle* d. *Gurnell* v. *Wood,* was 49 years ago in the common pleas. The next in order was that of *Selwin* v. *Selwin,* 2 Burr. 1131, in this court; and I am not inclined to give so little credit as the counsel for the plaintiffs in error to the opinion at the end of that case. It was not the opinion of Sir *James Burrow* himself, but of the court. It has been openly acknowledged by Lord *Mansfield,* and I have had repeated opportunities of hearing it from him in private, that he has given to Sir *J. Burrow* his own note and opinion of a case, which he could not deliver publicly in court: for it was not at that time the practice of this court to give their opinions here in cases which came from the court of chancery. This note at the end of that case shews decidedly what was the opinion of the court: But even if there were any doubt about it, we find that in *Roe* d. *Noden* v. *Griffiths,* 1 Wm. Bl. 605, Lord *Mansfield* declared that he was prepared (in the former case) to have shown, with the concurrence of the whole court, that contingent, springing, and executory uses were descendible, and also devisable. The last case upon this subject is that of *Moor* v. *Hawkins,* which is another direct authority. Then the counsel for the plaintiffs in error endeavored to show, on the forms of pleading, that this was not a devisable interest. The general rule of pleading is, that, if you show a particular estate,

you must show the commencement of it, and a seisin in fee of the person last seised. In this case the mode would be this, that the devisor was seised in his demesne as of fee: that he devised (*prout* the will), by which it appears that J. Lockyer took an interest in the estate by an executory devise; that he, being so entitled by virtue of the will, devised all his right and interest, &c., that the mesne estate has failed, and that the second devisee became entitled, &c. This mode of pleading is not liable to any objection, when it is stated that he had a devisable interest.

[*97] GROSE, J.: This question depends on the statutes of wills; and I have no doubt but that this, which is now claimed, was a devisable interest. The fourth section of the 34 & 35 H. 8, c. 5, which is explanatory of the 32 H. 8, c. 1, declares that all persons having a sole estate or *interest* in lands, &c., may devise: This does not include *a bare possibility, or hope of succession,* but a possibility, *accompanied with an interest.* The idea which has been entertained by some persons of the profession, that such a contingency as the present was not devisable, may be traced from the case of *Bishop* v. *Fountain* (3 Lev. 427); there lands were devised to Fountain in fee in trust to pay an annuity to the devisor's daughter Mary, and, if she had children, to convey successively to those children; for want of such issue the lands were directed to be conveyed to the eldest son of his nephew J. Cater, and the heirs of such eldest son; and an annuity was given to such eldest son till the estate should come to him: but if he claimed anything during the life of Mary, or any of her issue, then both the father and son were to be excluded from having anything out of his estate. The eldest son of J. Cater was Anthony, who had two sisters, the defendants. Anthony died, and left issue John his son, who in the lifetime of Mary devised to the plaintiff, and died without issue. Mary afterwards died without issue. The Court held that John had no estate devisable, but a mere possibility, during the life of Mary or any of her issue. But the reasons are not mentioned why it was to be considered as a mere possibility, unless by recurring to the above clause, which might be considered as rendering the devise to the eldest son of his nephew depending upon the condition of his not claiming during the life of Mary or any of her issue, and consequently contingent until that condition was performed, which could not be till the death of Mary without issue. He would rather have taken an equitable remainder in fee expectant on the death of Mary, and the failure of issue of her body, which would have been a vested estate, and consequently devisable. The statute of wills was not at all touched upon or considered by the court; and the only way in which I can account for this doctrine having been afterwards adopted by Lord Chief Justice *Parker,* and Lord *Hardwicke,* was because they considered it as a point already determined, and therefore did not enter into the reasons on which it could be supported. Now if the case in *Levinz* cannot [*98] be considered as law, the foundation, on which the other cases were built, is destroyed. And the modern cases

have decided the other way; on the authority of which I think the point is now settled. And even if it were not already so decided, I think it should be so on the words of the statutes.

Judgment affirmed.

An alternative contingent remainder in fee does not lapse by the death of the devisee in fee before the vesting of the estate, but descends to his heirs (or might be devised by his will, dictum). Hennessy v. Patterson (1881), 85 N. Y. 91, Finch's R. P. Cas. 868.

SMITH v. BRISSON, in N. Car. Sup. Ct., Feb., 1884.—90 N. Car. 284.

Ejectment. Both parties claim under a deed containing these words: "For and in consideration of the natural love and affection I have for my son, Rowland Mercer, and the further sum of one dollar to him in hand paid, the receipt of which is hereby acknowledged, has given, granted, bargained, sold, and conveyed, and do hereby give, bargain, sell and convey, to the said Roland Mercer and the heirs of his body, and if the said Roland Mercer should have no heirs, the said land shall go to the heirs of my son James A. Mercer, all that tract of land," &c.

ASHE, J. Both parties to this action claim title to the land described in the complaint under the deed executed by Roland Mercer, Sr., to Roland Mercer, Jr., on the 30th day of August, 1859. The plaintiffs contend that the deed conveyed an absolute estate in fee simple in the land to Rowland Mercer, Jr., and by his will the fee simple title to the same was devised to the feme plaintiff. The defendants, on the other hand, insist that the deed conveyed only a determinable fee to Rowland Mercer, Jr., which terminated by his death without children, and vested an absolute fee simple, by the limitation in said deed, in the children of James A. Mercer. * * *

At common law a fee simple could not be limited after a fee simple. There was no way known to that law by which a vested fee simple could be put an end to and another estate put in its place; and the reason is, because no freehold could pass without livery of seisin, which must operate immediately or not at all. But after the Statute of Uses, 27 Hen. 8, when the possession of the legal estate was transferred to the use, vesting the legal estate in the *cestui que use* in the same quality, manner, form, and condition that he held the use, and the courts of law assumed jurisdiction of uses, it was held that an estate created by deed operating under the statute might be made to commence *in futuro,* without any immediate transmutation of possession; as by bargain and sale, or a covenant to stand seised to uses. *Cessante ratione cessat et lex.* And consequently it was held that, by such conveyances, inheritances might be made to shift from one to another upon a supervening contingency; which to avoid perpetuities, was required to be such as must happen within a life or lives in being, and the period of gestation and twenty-one years thereafter. * * *

Thence arose the doctrine of springing and shifting uses, or conditional limitations. * * * It was under this doctrine of a shifting use

that it has been (*289) held since very early after the Statute of Uses, that a fee simple may be limited after a fee simple, either by deed or will; if by deed, it is a conditional limitation; if by will, it is an executory devise. "And in both these cases a fee may be limited after a fee." 2 Bl. Com. 334. * * *

The Statute of Uses is in force in this state. Code § 1330. And the deed, under which both parties to the action claim title to the land in controversy, has its operation under the statute, and as the consideration mentioned in it is both pecuniary and natural affection, it may operate either as a bargain and sale or as a covenant to stand seised, as to both parties, for they are all the blood relations of the grantor.

Our conclusion is that the limitation over to the children of James A. Mercer was good, and that there was error in the court below in not rendering judgment in their behalf upon the case agreed. * * * Reversed.

ALLEN v. FOGLER, in S. Car. Ct. of App., Dec. 1852.—6 Rich. Law 54.

Trespass to try title, by W. H. Allen and others, claiming as the heirs of Josiah Gillett Allen, against John J. Folgar, claiming under a deed made by Harriet Allen, who has died without issue. All parties claim through a deed in these words: "Know all men by these presents, that, I, Elijah Gillett, of state and district aforesaid, do, for the love and affection I bear towards Harriet Allen and Joseph Gillett Allen, give and bequesth to Harriet Allen, and to the heirs of her body, and in case of her death before she has an heir, I desire whatever I may give to her, may be the right and property of Josiah Gillett Allen, and in case of his death before he has an heir," &c.

O'NEALL, J. * * * That the limitation over would be good by way of executory devise, I do not entertain a doubt; for it would be within a life or lives in being and twenty-one years after. But the misfortune to the plaintiffs is that the question arises under a deed, and not under a will. It is a case of remainder. Mr. Fearne, in his book on Remainders. c. 6 § 8, p. 371, says, "A fee at common law cannot be mounted on a fee; as if lands are limited to one and his heirs, and if he dies without heirs, then to another, this last is void." In this case the first estate is a fee conditional at common law,[1] and upon that is mounted a fee eventually to Elijah Gillett Allen and his heirs. The latter is void under the rule cited from Mr. Fearne. The motion to reverse the decision below is dismissed. All concurred.

PALMER v. COOK, in Ill. Sup. Ct., Jan. 17, 1896.—159 Ill. 300, 42 N. E. 796, 50 Am. St. Rep. 165.

Bill for dower and partition by the surviving husband of Emily Cook. Her title was by the following deed: "The grantor, Thomas Stewart,

[1] Because the Statute De Donis was not in force in South Carolina.

of, [&c.], for and in consideration of one dollar in hand paid, doth hereby grant, bargain, sell, convey, and warrant to Mary A. Stewart and Emily C. Stewart, of Macoupin county, the following real estate [describing it]. And I, Thomas Stewart, as for myself, retain possession and reserve the use, profits, and full control, during my life; and further, in case either of the grantees dies without a heir, her interest to revert to the survivor. Dated this 10th day of March, 1883. Thomas Stewart." The trial court held the fee vested in the grantees, and decreed dower and partition. Mary, the other grantee, appeals, and contents that the grantees took simply a life estate, with a contingent remainder to the survivor in fee.

PHILLIPS, J. * * * By the thirteenth section of chapter 30 of the Revised Statutes it is provided: "Every estate in lands which shall be granted, conveyed, or devised although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed, or devised by construction or operation of law." By § 9 of the same chapter the words "convey and warrant" to the grantee are declared to be a conveyance in fee simple to the grantee, and his heirs and assigns, with certain covenants, &c.

This deed is clearly within the letter and spirit of § 9, and, by the two sections above named, a fee simple estate was vested in the grantees. It is an established principle of construction of contingent remainders, that an estate cannot, by deed, be limited to another after a fee already granted. The term "remainder" necessarily implies what is left, and, if the entire estate is granted, there can be no remainder. This deed affected an absolute fee simple conveyance by the first clause of the deed and vested the estate. By the last clause an attempt is made to mount a fee upon a fee, which can only be done by executory devise: *Smith* v. *Kimbell*, 153 Ill. 368, 38 N. E. 1029; *Fowler* v. *Black*, 136 Ill. 363, 26 N. E. 596; *Griswold*, v. *Hicks*, 132 Ill. 494, 24 N. E. 63, 22 Am. St. Rep. 549. * * * Under these principles this deed reserved to the grantor a life estate, and vested the fee in the grantees; and the clause, "and further, in case either of the grantees dies without a heir, her interest to revert to the survivor," must be held to be inoperative as a limitation of a fee.

Decree affirmed.

The case above was cited and distinguished in Cover v. James (1905), 217 Ill. 309, 75 N. E. 490, ; in which it was held that, "convey and warrant to A. Fred Cover and Bessie Cover * * *. In case of the death of either * * * the other to have the whole of said property without litigation," gave them an estate for their joint lives, with remainder to the survivor.

By the Statute of Uses a fee might be limited after a fee, and that statute is expressly re-enacted in Illinois. Does that fact affect this case?

Statute of New York, Mich., &c. "A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, shall die under the age of 21

years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age." **N. Y.** R. S. (1828), pt. 2, c. 1, t. 2, Art. 1, § 16; **Mich.** R. S. (1846), c. 62, § 16, C. L. (1897), § 8798; **Minn.** St. (1866), c. 45, § 16, R. L. (1905), § 3205; **Wis.** R. S. (1849), c. 56, § 16, St. (1898), § 2040.

After Life Estate out of Term for Years.

ANON., in Common Bench, Easter term, 28 Hen. VIII, A. D. 1537.—1 Dyer 7.

A man possessed of a term for forty years makes his will; and thereby wills "that A, his eldest daughter, shall have the term to her and to the heirs of her body begotten, the remainder if she die without issue within the term to C, his second daughter, in tail," &c.; and the oldest daughter marries and dies without issue within the term, and after her death the husband sold the term; and the question was, What remedy hath the younger daughter? And BALDWIN [C. J.] and SHELLEY [J.] held that she hath none. For it is contrary to law that a term may be limited in remainder any more than other chattel personal, as a cup or other chattel; as a remainder of books in 34 or 35 Hen. 6 [37 Hen. 6, 30] is void. So it appeared to them that the sale by the husband is good enough and indefeasible. ENGLEFIELD [J.] thought it might remain, for that it is by will, and the intention of the maker should be construed; and that was no more than if it should happen that the eldest daughter die without issue within the term that the second daughter should have it, and he thought it might remain immediately after her death and that the second daughter might enter, &c. BALDWIN [C. J.]: This is not like your case; for I readily agree, that if a man devise his term to one upon such condition, that if he die within the term a stranger should have it, in that case he does not give all his term and interest to him, but so much of the term as runs during his life, and the residue the stranger shall have. But in our case he devises all the term entire to his eldest daughter; wherefore it does not resemble, &c. And he said that he had moved this very question when he was a sergeant and the court were of his present opinion, &c.

ANON., 33 Hen. 8.—A. D. 1541.—Brooke's New Cases pl. 209, Marsh's Translation, Chattels. Bro. Abr. Chattels 23.

If a lessee for years devise his term, or other his chattel or goods, by testament, to one for term of his life, the remainder over to another, and dies, and the devisee enters and aliens not the term, nor gives nor sells the chattel, and dies, there he in remainder shall have it. But if the first devisee had aliened, given, or sold it, there he in remainder had been without remedy for it. And so, it seems, if they be forfeit in his life, he in remainder hath no remedy.

ANON., in King's Bench, Mich. 6 Edw. 6.—A. D. 1553.—Dyer 74a.

A termor of a parsonage devised his entire lease, term, and interest, to another, provided, if it should happen that the devisee die in the life-time of I. S., that then the said lease, term, and [*74b] interest, should remain entire to the said I. S. during the residue of the term of the lease. The devisee sold the term entire, and died in the life-time of I. S. Whether I. S. hath any remedy for the term or not? And LORD MONTAGUE [C. J.] and Justice HALES thought not. And it was said by MONTAGUE, that the case was ruled by the opinion of all the justices in the time of LORD RICH, when he was chancellor.

See the comment on this and the other cases of this kind by Lord Chancellor Nottingham in the Duke of Norfolk's Case. post —

FITZ-JAMES'S CASE, in Common Pleas of England, 7 Eliz., A. D. 1565.—Owen 33, 5 Gray's Cases on Property, 130.

Note by Dyer, that the Lord Fitz-James, late lord chief justice of England, did devise his land to Nicholas Fitz-James in tail, with divers remainders over; and in the same devise he devised divers jewels and pieces of plate, viz., the use of them to the said Nicholas Fitz-James and the heirs males of his body. In this case it was the opinion of the court that the said Nicholas had no property in the said plate, but only the use and occupation. And the same law where the devise was that his wife should inherit one of his houses (which he had for term of years) during her life, because the wife takes no interest in the term, but only an occupation and usage, out of which the executors cannot eject her during her life; but WALSH held the contrary.

AMNER and LUDDINGTON'S CASE, in the King's Bench, Mich., 26 Eliz., A. D. 1584.—2 Leon. 92, 3 Leon. 89.

A writ of error was brought in the king's bench by Amner against Luddington, Mich. 26 Eliz. Rot. 495. And the case was that one Weldon was seised, and leased to one Peerepoint for 99 years, who devised the same by his will in this manner, viz.: "I bequeath to my wife the lease of my house during her life; and after her death, I will it to go amongst my children unpreferred." Peerepoint died, his wife entered, and was possessed by virtue of the legacy aforesaid, and took to husband one Fulshurst, against whom Beswick recovered in an action of debt 140*l.*, upon which recovery issued a *scire facias*, and upon that a *venditioni exponas*, upon which the sheriff sold the term so devised to one Reynolds. Fulshurst died, his executor brought error, and reversed the judgment given against the testator at the suit of Beswick. The wife re-entered, sold the term, and died. Alice, a daughter of Peerepoint unpreferred, entered; and upon this matter found by special verdict in the common pleas, the entry of Alice was adjudged lawful. Upon which judgment error was brought in the king's bench; and it was argued upon the words of the devise, because here the lease is not devised but all his

interest in the thing devised: and it is not like to the case between *Weldon and Elkington,* 20 Eliz., Plowd. Com. 519, where the case was, that Davies being lessee for years devised that his wife should have and occupy his land demised for so many years as she should live; nor unto the case betwixt *Paramour and Yardley,* 21 Eliz., Plowd. Com. 539, for there the lessee devised, that his wife should have the occupation and profits of the lands until the full age of his son; for in those cases, the land itself is *quodam modo* devised; but in our case all the estate is devised, i. e., the lease itself. And also in those two devises a certain person is named in the will, who should take the residue of the term which should expire after the death of the wife, but in the case at bar no person in certain is appointed, &c., but the devise as to that is conceived in general words—*children unpreferred; ergo,* neither any possibility, nor any remainder is in any person certain, therefore all the whole term is entirely in the wife, and then she may well dispose of the whole. But the whole court was to the contrary, and that in this case the possibility should rise well enough upon the death of the wife, to the daughter Alice unpreferred. Another matter was moved, if the said term being sold in the possession of the wife of the devisor by force of the execution aforesaid, if now, the judgment being reversed, the sale of the term be also avoided, for now the party is to be restored to all that which he had lost. And it was argued by *Coke,* that notwithstanding the reversal of the judgment the sale did stand good; * * * and the court, as to that point, all agreed; but that point did not fall in judgment; for by the sale nothing shall pass but the interest *in presenti* which was in the wife of the devisor; but the possibility to the children unpreferred was not touched thereby; and afterwards the judgment was affirmed.

STANLEY v. BAKER, in Queen's Bench, Mich., 27 & 28 Eliz., A. D. 1586.—Moore 220.

Hitchcock, possessed of a lease for years, devised it to his oldest son and the heirs of his body, and if he die without issue to his younger son and the heirs of his body, and on default of such issue that the term remain to his daughters. He died leaving two daughters and another was afterwards born. The eldest son sold the term and died without issue; the younger also died without issue; and the three daughters entered. And the term was adjudged to the three, although the younger was not born till after the death of the devisor. Otherwise, if the two daughters had been named in the devise by their proper names.

RAYMAN v. GOLD, in Common Bench, Hilary, 34 Eliz., A. D. 1592.—Moore 635.

Ejectione firmae. It was found by verdict that Soper, possessing a term for 80 years, devised that after the death of his wife, whom he made sole executor, his sons John and Edw. shall have the whole profit of my farm, and the longest liver of them shall appoint who shall have

the residue of the years which shall be remaining at the time. The points moved were three: 1. If the widow had any estate by implication for her life, as she would have in land of inheritance; and they agreed that she would not, because the devisor could not in his life make an estate for life out of a term. 2. If the devise of the profits was a devise of the term itself, and it was so agreed. 3. If the termor may devise to one for life, with remainder of the years to others who should be to come at the time of the death of the first devisee, or the same land after the death of the tenant for life. As to this the court held that he could not, yet that a termor may demise the land for certain years if the lessee so long live, and may demise the same land to another to commence after the death of the first devisee, and it will be good. But note that in the principal case the widow all her life held the term as executor, and not by implication of the devise; and the estate of the sons is not appointed to commence till after the death of the widow; by which it seemed to the court that it may well be as a devise to the sons after the death of the widow, she having taken nothing by the devise; and this inured as if the termor devise that after the death of a stranger J. S. should have the land for such years as then should be to come; and this is good by devise, because he might so have done by demise in his life.

FOSTER v. BROWN, in Trinity 2 Jac. 1, A. D. 1605.—Moore 758.

A lessee for years devised the profits of his term to his wife for life, remainder to Agnes Hast for her life if Gabriel Mermion, his son-in-law, within two years after devisor's death should not bind himself in 100£. *General* allowed that a devise of the profits is a devise of the term itself; and he held the remainder good and not interrupted by what had happened; and for this he cited *Palmer's Case* in the exchequer chamber, 33 Eliz.; and *Almer and Lodington's Case* in the common bench, 35 Eliz. [above?]; and [the same case?] *Pierpoint's Case,* 27 Eliz., adjudged in the common bench and affirmed on error in the queen's bench; which cases prove the remainder good after an estate for life of a term. But a remainder in tail, or an estate in tail of a term is void, as adjudged Trinity 27 Eliz. in the queen's bench in *Miller's Case. Brooke,* to the contrary; and he cited the *Rector of Chedington's Case,* 1 Coke 153; 37 Hen. 6 [30]; 28 Hen. 8, Dyer 7 [*ante* —]; 33 Hen. 8, Brooke [Abr. t.] *done and remainder* [57?] in time of Hen. 8; Brooke [Abr.], *Hoe's Case,* 334; Brooke [Abr. t.] devise 13, 2 Ed. 6; Brooke [Abr.] 168; 10 Eliz., Dyer 277 [b pl. 59]; 13 Eliz., [*Welcden* v. *Elkington,* 3 Dyer] 358; and Trin. 29 Eliz., rot. 1874, *Hamington's Case:* that the devise of the profits to the woman during her widowhood with the remainder over was good. The second point was if the remainder limited to Gabriel on a condition precedent of entering into bond within the year after the death of the devisor was good, as he did not enter into bond. They agreed that it was good notwithstanding,

because the time he was to have was a year, and the woman died within two months, so that the condition was discharged by the act of God. *Note* that the case was adjudged with Brooke, but with a special entry by the court in the roll that they did not give judgment on the remainder but on the release afterward procured of the executors.

MATTHEW MANNING'S CASE, in the Common Pleas, Trinity, 7 Jac. 1, A. D. 1610.—8 Coke 94b.

In debt for 200 marks by William Clark, plaintiff, and Matthew Manning, administrator of Edward Manning, deceased, upon *plene administravit* pleaded the jury gave a special verdict to the effect following, which plea began Mich. 4 Jacobi, Rot. 1829: Edward Manning, the intestate, *anno* 30 Eliz., was possessed of the moiety of a mill in Clifton, in the county of Oxford, for the term of fifty years, of the clear yearly value of 40*l.*; and afterwards the said Edw. Manning, 30 Eliz., made his will in writing, and thereby devised his indenture and lease of the farm and mill in Clifton and all the years therein to come to Matthew Manning after the death of Mary Manning, my wife, (which farm and mill my will is that Mary Manning my wife shall enjoy during her life) conditionally that the said Matthew shall not demise, sell, or give, the said lease, but to leave it wholly to John his son, &c. "In meantime my will and meaning is that Mary Manning my wife shall have the use and occupation both of the farm and mill, &c., during her natural life, yielding and paying therefor yearly to the said Matthew Manning, &c., during her natural life 7*l.* at the feasts of St. Michael the archangel and the Annunciation of our Lady," and made Mary his wife his sole executrix and died. Mary took upon her the charge of the will, and had not sufficient to pay the debts of the said Ed. Manning above the said term, but she entered unto the said farm and mill, and paid to Mat. Manning the yearly sum of 7*l.* according to the said will; and said that if she died the said Mat. Manning should have the farm and mill aforesaid. And afterwards the said Mary, 16 years after the death of her husband, died intestate, after whose death the said Mat. Manning entered into the said farm and mill and was thereof possessed *prout lex postulat;* and afterwards administration of the goods of the said Edw. by the said Mary not administered was committed to the said Matthew and that none of the said profits of the said farm and mill which accrued in the life of the said Mary came to the hands of the said Matthew besides the said 7*l.* yearly as aforesaid. And the doubt of the jury was if the residue of the said term in the said farm and mill should be assets in the hands of the said Matthew. But I conceived on the trial of the issue at Guild-hall in London, that the devise to Matthew was good, and that there was sufficient assent to the legacy by the said payment of the rent of 7*l.* But yet upon the motion of the plaintiff's counsel, I was contented that the whole special matter should be found as is aforesaid.

And the case was argued at the bar and at divers several days debated

at the bench. And, *prima facie,* WALMSLEY, Just., conceived that the devise to Matthew Manning after the death of the wife was void: for the wife, having it devised to her during her life, she had the whole term, and the devisor could not devise the possibility over, no more than a man can do by grant in his life; for that which the testator cannot do by no advice of counsel in his life, the testator, who is intended to be *inops consilii,* shall not do by his will. But by grant in his life he could not grant the land unto the wife for her life, the remainder over to another, for by the grant the wife had the whole term at least if she so long lived, and a possibility cannot be limited by way of remainder. And although the later opinions in the case where a man possessed of a lease for years devises it to one for life the remainder to another have been that the remainder was good, yet he said that the old opinion (which hath more reason, as he conceived) was that the remainder in such case was void: 28 Hen. 8, Dyer 7 [*ante* —], Baldwin and Shelley that the remainder is void, Englefield contrary; 6 Edw. 6, Dyer 74 [*ante* —], accord by Hales and Montague; 2 Edw. 6, Brooke Abr. t. Devise 13, that the remainder is void, for the devise of a chattel for one hour is good forever.

But COKE, C. J., WARBURTON, DANIEL, and FOSTER [JJ.], contrary, that the devise was good to Matthew Manning; and five points were by them resolved:

1. That Matthew Manning took it not by way of remainder, but by way of an executory devise; and one may devise an estate by his last will in such manner as he cannot do by any grant or conveyance in his life, as if a man is seized of lands in fee held in socage, and devises that if A pays such a sum to his executors, that he shall have the land to him and his heirs (or in tail, or for life, &c.) and dies, and afterwards A pays the money, he shall have the land by this executory devise, and yet he could not have it by any grant or conveyance executory at the common law; but it stands well with the nature of a devise. So in the case at bar when the wife does it shall vest in Matthew Manning as by an executory devise, as if he has devised that after his son has paid such a sum to his executors, that he shall have the term, or that after the death of A that B shall have the term, or that after his son shall return from beyond the seas (or that A dies) that he shall have it—in all these cases and other like, upon the condition or contingent performed, the devise is good, and in the meantime the testator may dispose of it; and therefore in judgment of law, *ut res magis valeat,* the executory devise shall precede, and the disposition of the lease till the contingent happen shall be subsequent, as in the case at bar it was, and so all shall well stand together. For when he made the executory devise he had a lawful power, and might well make it; and afterwards in the same will he had lawful power, and might well devise the lease till the contingent happened, and therefore it is as much as if the testator had devised that if his wife died within the term, that then Mat-

thew Manning should have the residue of the term, and further devised it to his wife for her life.

2. The case is more strong because this devise is but a chattel, whereof no præcipe lies, and which may vest and revest at the pleasure of the devisor without any prejudice to any. And therefore if a man makes a lease for years, on condition that if he do not such a thing the lease shall be void, and afterwards he grants the reversion over [and] the condition is broken, the grantee shall take benefit of this condition by the common law, for the lease is thereby absolutely void; but in such case if the lease had been for life with such condition, the grantee should not take benefit of the breach of the condition; for a freehold (of which a præcipe lies) cannot so easily cease, but is voidable by entry after the condition broken, which cannot by the common law be transferred to a stranger; and therewith agrees 11 Hen. VII, 17a; and Brooke Abr., Conditions 245, 2 Mary, by Bromley, the same difference.

3. There is no difference when one devises his term for life, the remainder over, and when a man devises the land or his lease, or farm, or the use, or occupation, or profits of his land; for in a will the intent and meaning of the devisor is to be observed, and the law will make construction of the words to satisfy his intent, and to put them into such order and course that his will shall take effect. And always the intention of the devisor expressed in his will is the best expositor, director, and disposer of his words; and when a man devises his lease to one for life, it is as much as to say he shall have so many of the years as he shall live, and that if he dies within the term, that another shall have it for the residue of the years; and although at the beginning it be uncertain how many years he shall live, yet when he dies it is certain how many years he has lived and how many years the other shall have it, and so by a subsequent act all is made certain.

4. That, after the executor has assented to the first devise, it lies not in the power of the first devise to bar him who has the future devise, for he cannot transfer more to another than he has himself.

5. In many cases a man by his will may create an interest which by grant or conveyance at the common law he cannot create in his life. And therefore when Sir William Cordell, master of the rolls, devised his manor of Melford, &c., in the county of Suffolk, to his executors for payment of his debts and until his debts should be paid, the remainder to his brother, &c., and made George Carey and others his executors and died, and after his death the debts were paid, and his wife demanded dower, and one question amongst others was moved, what interest or estate the executors had (for if they had a freehold, then the wife should not have dower, and if they had but a chattel determinable upon the payment of the debts, then she should be endowed), and this case was referred to Anderson, chief justice of the common pleas, and Francis Gawdie, justice of the king's bench, before whom the case was at several days debated, *Pasch.* 30 Eliz. (and I was of

counsel with the executors), and it was resolved by them that the executors had but a chattel and no freehold; for if they should have a freehold for their lives, then their estate would determine by their death and not go to the executors of the executors, and so the debts would remain unpaid; but the law adjudges it a particular interest in the land which shall go to the executors of the executors, as assets for the payment of his debts. But if such estate be made by grant or conveyance at the common law, the law will adjudge it an estate of freehold; and so a more favorable interpretation is made of a will in point of interest or estate to satisfy the will of the dead for the payment of his debts than of a grant or conveyance in his life, which he may enlarge or make other provision at his pleasure. And so was it resolved in the beginning of the reign of Queen Elizabeth, that where a man had issue a daughter, and devised his lands to his executors for the payment of his debts and until his debts were paid, and made his executors and died, the executors entered, the daughter married, had issue, and died, and after the debts were paid, and it was resolved in the case of one Guavarra that he should be tenant by the curtesy. *Vide:* 3 Hen. VII, 13; 27 Hen. VIII, 5; 21 Assize, p. 8; 14 Hen. VIII, 13.

Note, READER, it has been of late often adjudged according to these resolutions: *scil.* in *Weldon's Case,* Plow. Com. 516, in the common bench; in *Paramour's Case,* Plow. Com. [539], in the king's bench; Mich. 26 & 27 Eliz., in a writ of error in the king's bench, on a judgment given by the common pleas, the case was such [here stating the facts of *Amner* v. *Luddington* substantially as reported above]. And this case was often argued at bar by the sergeants in the common pleas, and at last by the judges; and in this case three points were by them resolved: 1. That the said executory devise of the lease after the death of the wife to the daughter unpreferred was good; and there is no difference when the term or lease, or houses, and when the use, or occupation, &c., is devised, and that in all these cases the executory devise is good. 2. That the sale either by Alice the wife or by the sheriff on the *fieri facias* after the wife was possessed as legatory should not destroy the executory devise, although the person to whom the executory devise was made was then uncertain as long as Alice the wife lived; for the said Alice the daughter might have been preferred in her life, and then she should take nothing, so that such executory devise which has dependence on the first devise may be made to a person uncertain, and this possibility cannot be defeated by any sale made by the first devisee, &c. 3. That the sale by the sheriff by force of the *fieri facias* should stand, although the judgment was after reversed, and the plaintiff in the writ of error restored to the value, for the sheriff who made the sale had lawful authority to sell, and by the sale the vendee had an absolute property in the term during the life of Alice the wife; and although the judgment which was the warrant of the *fieri facias* be afterwards reversed, yet the sale which was a collateral act done by the sheriff by force of the *fieri facias* shall not be avoided; for the judg-

ment was that the plaintiff should recover his debt, and the *fieri facias* is to levy it of the defendant's goods and chattels, by force of which the sheriff sold the term which the defendant had in the right of his wife, as he well might, and the vendee paid money to the value of it; and if the sale of the term should be avoided the vendee would lose his term and his money too, and thereupon great inconvenience would follow that none would buy of the sheriff goods or chattels in such cases, and so execution of judgments (which is the life of the law in such case) would not be done.

And according to these resolutions judgment was given in the common pleas for the plaintiff; and in the king's bench upon a writ of error the case was often argued at the bar before Sir Christopher Wray, and the court there, and at length the judgment was affirmed, and so the said three points were adjudged by both courts. And by these latter judgments you will better understand the law in the books, in which there are variety of opinions: 37 Hen. VI, 30; 33 Hen. VIII, Brooke Abr. t. Chattels 33 [*ante* —]; 2 Edw. VI, Brooke Abr. t. Devise 13; 28 Hen. VIII, Dyer 277, Plow. Com. [516, 539], in Weldon's and Paramour's Case, &c. *Quia justicia posteriora sunt in lege fortiora.*

PRICE v. ALMORY, in King's Bench, Trinity, 10 Jac. 1, A. D. 1613.—Moore 831.

In *ejectione firmae*, it was found specially that Tho. Moore, possessing a term for 40 years, devised it to his wife for life if so long a widow, remainder to his son and the heirs of his body. The wife being executor entered and claimed the term as a legacy. John the son died in the life of the wife, the wife died, John's executor entered, and the court was of opinion that the entry of the executors was not lawful, because John had only a possibility and no interest. See *Chedington's Case* 1 Coke 153, where such possibility did not pass to the administrator; and *Manning's Case,* 8 Coke 96, where such devise was good as an executory devise; but the case did not say that if the devisee of such possibility die before the event happened, if the possibility would pass to the executor. The court agreed that the heir of John the son could not take the possibility by limitation.

COTTON v. HEATH, in King's Bench, 1638.—1 Roll. Abr. 612, pl. 3, 5 Gray's Cases on Property, 135.

If A, possessed of a term of years, devises it to B, his wife, for 18 years, then to C, his eldest son, for life, and then to the eldest issue male of C for life, although C has no issue male at the time of the devise and death of the devisor, yet if he has issue male before his death, such issue male will have it as an executory devise; because, although it be a contingency upon a contingency, and the issue not *in esse* at the time of the devise, yet as it is limited to him but for life, it is good, and all one with *Manning's Case* [*ante* —]. On a reference out of chancery

to the Justices JONES, CROKE, and BERKELEY, by them resolved without question.

WRIGHT ex d. PLOWDEN v. CARTWRIGHT, in King's Bench of England, Easter term, 30 Geo. II, A. D. 1757.—1 Burrows 282.

On case stated from the assizes. Edmund Plowden, being seized in fee, demised by deed indented between him and Elizabeth Cartwright only, Oct. 5, 1676, to her for 99 years if she so long live, and after her death if she happen to die within the said *term* or other end or termination of the said term, the remainder to Rowland Cartwright (her eldest son then within age) for and during the residue of said term from thence ensuing and fully to be complete and ended; yielding and paying, &c., and doing suit at a mill, &c., with penalty for every time that she or Rowland shall grind at another mill, and paying a heriot on the death of either. And it was covenanted that both of them shall repair, &c., and the lessor on his part covenants that both shall quietly enjoy. Elizabeth entered, was possessed, and died Sept. 4, 1694; whereon Rowland entered and was possessed till he died Nov. 5, 1753. Plaintiff's lessor is heir of Edmund Plowden; defendant is the personal representative of Rowland.

Aston **argued for the plaintiff that the term was expired on the death of Elizabeth, the limitation over being void; and he cited Dyer 253b, pl. 102;** ***Green*** **v.** ***Edwards*****, Cro. Eliz. 216 [*** ***ante*** **—] as exactly this case;** ***Rector of Chedlington's Case*****, 1 Coke 153b;** ***Coke Lit.*** **45b; and** ***Sheppards' Touchstone*** **274.**

Nares**, when beginning to speak for the defendant, was stopped by the chief justice, who proceeded thus:**

LORD MANSFIELD: The distinction just cited from *Sheppard* (which he takes from the *Rector of Chedington's Case*) makes no difference if the word *term* may signify the time as well as the interest, for then it becomes merely a question of construction which sense the word ought to be understood in. So Anderson argued in *Green* v. *Edwards*. He said: "If the wife had been a party to the deed, *durante termino* should not be taken for the interest but for the time." He said: "The word *term* cannot be taken to mean the interest which the husband had for the 90 years;" for if it is so understood, by his death the whole would be determined, and the wife could have nothing; and therefore it could not be used in this sense, but the lessor by the word *term* must mean the time of 90 years, and the word *term* signifies as well the time or space of 90 years as the interest. The other judges held the limitation by way of remainder to be void from the uncertainty of commencement, and denied that the wife's being a party would have made any alteration.

The old cases held that there could be no remainder or substitution of a term after an estate for life, by deed or by will. It was a mere possibility. It was void from the uncertainty of commencement. There was no particular estate. The gift of a term (like any other chattel)

for an hour was good forever. The objections were subtle and artificial. When long and beneficial terms came in use the convenience of families required that they might be settled upon a child after the death of a parent. Such limitations were soon allowed to be created by will, and the old objections were removed by changing the name, from remainders to executory devices. The same reasons required that such limitations might be created by deed; as, for instance, marriage settlements to answer the agreements of parties and exigencies of families. Therefore, to get out of the literal authority of old cases, an ingenious distinction was invented, a remainder might be limited for the residue of the term. Now in this case, upon the true construction of the lease, I am clearly of opinion that the land was demised to the son for so many of 90 years as should be unexpired at the death of his mother. There are many maxims of law that deeds, especially such as execute mutual agreements for valuable consideration, should be construed liberally, *ut res magis valeat* according to the intent, which ought always to prevail unless it be contrary to law.

The passage from *Coke Littleton* 45b, cited by Mr. Aston, defines the word *term* to signify in understanding of law "not only the limits and limitations of time, but also the estate and interest which passes for that time." If in this lease the word be taken in the latter sense, the widow can only have it for so many of 99 years as she should live, and the son have nothing afterwards. But it is manifest that an interest was understood to continue after her death, to be enjoyed by her son. From the course of nature it could not be supposed that she would outlive the 99 years. Rowland is to pay a penalty for grinding at another mill. He is to pay a heriot on the death of his mother. He is to repair. The lessor covenants that Rowland shall quietly enjoy, *i. e.,* for so many years as should not be run at the death of his mother. The first sense of the word makes everything consistent and effectual; the second sense destroys one-half of the lease as repugnant and contradictory to the other. There ought to be no doubt, therefore, in which sense the word should be understood.

Mr. Aston has laid no stress upon the only objection which weighed with Anderson, so long ago as 33d Elizabeth, viz., that Rowland was no party to the lease; and rightly. The reason why he was no party appears from the lease: he was an infant; the mother contracts and procures this limitation for him. A grant may be made to a person by a deed to which he is no party. Rowland accepted and actually enjoyed after his mother's death, from the 4th of September, 1694, to his own death, the 5th of November, 1753. The lease was so intelligible to every unlearned eye that nobody doubted of his title for 60 years. Limitations of terms are now of general use. Their bounds are settled. The rules concerning them are established. When they came to be allowed by will or by declaration of trust the substantial reason was the same for allowing them by deed. A strained construction should not be made to overturn the lawful intent of the parties. It was lawful to secure this

lease for the benefit of the mother during her life, and afterwards by way of provision for her son. All the parties undoubtedly intended it. The covenant here, that Rowland should enjoy from the death of his mother, is sufficiently certain, and might of itself amount to a lease.

MR. JUSTICE DENISON: This must be taken that she should hold it for so much of the term of years as she should live, and Rowland during the remainder. The intention of the deed is obvious, and it certainly shows, upon the whole tenor of it, that the intention of the parties was that both should enjoy during the whole term and number of years. And if we can support the intention by any construction we will do it.

MR. JUSTICE FOSTER was clear that the intention was that both should enjoy during the whole term and number of years, viz.: Elizabeth for so long of it as she should live, and Rowland during the remainder. All the circumstances show this; and the reserving a heriot upon the death of Rowland proves the intention to have been that the term should continue to Rowland after the death of his mother. And the covenants all along run, "that Rowland shall quietly enjoy." Therefore he concurred.

Per Curiam, unanimously (Mr. Justice WILMOT, absent): RULE: That the *plaintiff be nonsuited.*

CULBRETH v. SMITH, in Maryland Court of Appeals, Nov. 23, 1888—69 Md. 450, 16 Atl. 112, 1 L. R. A. 538.

Bill of Culbreth as administrator *cum testamento annexo* of John Girard, against Chas. Smith and others children of Wm. Smith. Plaintiff appeals from decree dismissing the bill.

MCSHERRY, J.: Susan Coburn, who owned a leasehold estate for the unexpired portion of a term of 99 years, renewable forever, executed a deed granting and assigning that estate to her grand-nephew James Coburn Smith and her grandson John Gerard Coburn, "subject to the reservations and conditions hereinafter," in the deed, "expressed." The deed, after describing the property, proceeds: "Reserving, however, to Susan Coburn, the use and enjoyment of the said property for and during the term of her natural life, so that she may have, hold, use, occupy, and enjoy the same, and collect and apply the rents, issues, and profits thereof, as fully and completely as though these presents had not been executed, and, from and immediately after the death of said Susan Coburn, then to have and hold the same * * * unto the said James Coburn Smith and John Gerard Coburn, in the manner following, that is to say: * * * As to one undivided moiety or half part thereof, to the said James Coburn Smith, his personal representatives and assigns, and as to the other moiety to the said John Gerard Coburn for and during the term of his natural life, and after his death then to his children and descendants *per sterpes;* but should he die without issue and leaving said Susan Knight surviving him, then to said Susan Knight for and during the term of her natural life; * * * and after the death of said Susan Knight, or upon the death of the said John Gerard

Coburn, should he survive her and die without issue, then to the children and descendants (other than said James Coburn Smith) of William Smith, nephew of said Susan Coburn, *per sterpes.*" She subsequently made a will wherein she names the said John Gerard Coburn residuary devisee and legatee. Shortly thereafter she and the said James Coburn Smith executed a deed to John Gerard Coburn, conveying to him the moiety of said leasehold estate granted to Smith in the first mentioned deed, and declaring that this conveyance of said moiety was "subject to a life-estate therein of said Susan Coburn, and to the limitations and conditions set forth in" the first-mentioned deed, and also "to the remainder and remainders therein provided, and in all respects in the same manner and upon the same terms as though both moieties of said property had passed to said John G. Coburn in and by the deed aforesaid." Susan Coburn died in 1882. John Gerard Coburn died in 1887 without ever having had any issue. Susan Knight died after the bill of complaint was filed in this cause; and now the children of William Smith (other than James Coburn Smith) claim the leasehold estate under the limitations to them in the deeds we have quoted from. The appellant, who is the administrator *c. t. a.* of the estate of John Gerard Coburn, filed a bill in the circuit court of Baltimore city, insisting that these deeds are void; that they did not convey the term out of Susan Coburn; and that, consequently, that property passed under the residuary clause of her will to John Gerard Coburn, and belongs to his personal representatives. The ground upon which this claim is founded is thus stated in the bill of complaint, viz.: "Your orator is advised that no interest passed from the said Susan Coburn by the said deeds, because said deeds are void, it being apparent that she did not mean to part with her interest in the term during her own life, and her life interest being deemed in law of greater value and longer duration than any term of years; so that the interest of the said Susan Coburn in said property was the same after the execution of said deeds as before, and she was possessed of the same interest in the same manner at the time of her death." Some of the defendants answered the bill, one demurred, and one pleaded to the jurisdiction of the court. The circuit court, upon hearing, dismissed the bill; hence this appeal.

It is obvious that this claim of the appellant is based upon the narrowest technical grounds, and rests solely upon the assumption that the reservation of a life-estate by deed in a chattel real defeats every limitation in remainder. The particular regard which the common law showed to the tenant of a freehold, and the preference given to him above a tenant for years, depended upon feudal principles which have no application to the condition of society under our form of government. In feudal times this estate was, perhaps, more valuable and permanent than an estate for years, as long terms were then unknown; or more honorable, as proof of military tenure, which embraced privileges only allowed to tenants of the king, who took the oath of fealty—an oath which was never permitted to be taken by any whose estate was less

than for life: 1 Taylor, Landlord and Tenant (8th ed.), §14 note. But this undoubted doctrine for the common law, that an estate in land for life is superior to an estate for years, no matter how long its duration may be, has no relation whatever to a case like this; and any attempt to apply it here would lead to the most erroneous and anomalous results, as a brief consideration will clearly demonstrate. A leasehold has always been considered personal estate, subject to all the rules governing that species of property, save in so far as those rules have been modified by express legislation: *Arthur* v. *Cole,* 56 Md. 107; *Taylor* v. *Taylor,* 47 Md. 295. Blackstone, in his Commentaries (book 2, c. 9, *144), observes that "because no livery of seizin is necessary to a lease for years, such lessee is not said to be seized or to have legal seizin of the lands. Nor, indeed, does the bare lease vest any estate in the lessee, but only gives him a right of entry on the tenement, which right is called his interest in the term, or *interesse termini;* but when he has actually so entered, and thereby accepted the grant, the estate is then, and not before, vested in him, and he is possessed, not properly of the land, but of the term of years—the possession or seizin of the land remaining still in him who had the freehold." The reversionary freehold estate is subject exclusively to the law that governs real property, while the leasehold estate is mainly controlled by the law that governs personalty; the one estate passing by descent, and being subject to the law of partition among heirs, while the other is the subject of administration, and is governed by the law that directs distribution of personal estate: *Myers* v. *Silljacks,* 58 Md. 330.

It is apparent therefore that the estate held by Susan Coburn before she executed the deeds to John G. Coburn was merely personal property, because only an interest in the residue of a term of years renewable forever. But she conveyed this personal property to John G. Coburn for his life, with remainders over, reserving to herself a life-estate therein. This reservation, being for her life, converted, it is insisted, a purely personal estate into a freehold, and changed what was only an interest in a term into a freehold interest in land. Thus by her own act, if this be true, she enlarged her estate from personal to real, and, by force of the reservation, vested in herself an estate of a quality and character totally different from and superior to the one she in fact originally possessed. This she certainly could not do, because a life-estate in personal property can never, from the nature of the thing, become a freehold estate—can never become real estate. The anomaly becomes more striking if we suppose the case of a conveyance of a leasehold estate for life to one grantee, and for the residue of the term to another. The grantor having but an interest in the term conveys that interest to one for life, who thereupon takes at once, not what the grantor could confer, but a freehold—an estate in the land—which the grantor not only never had or possessed, and consequently could not convey, but which in fact belonged to another person, the lessor. The result would be that the grantee would succeed to an estate greater than that

which his grantor enjoyed. As no one can grant that which he does not have, it is difficult to perceive how the owner of a chattel real can possibly, by any form of conveyance or by any act of his own, enlarge that chattel into a freehold estate, either in himself or in his alienee.

Whatever may have been the doctrine asserted in some very old cases on this subject, the strong tendency of the courts has been to discard such subtle and artificial rules, and even sometimes to invent the most refined distinctions to accomplish that end. The case of *Wright* v. *Cartwright,* 1 Burrow 282 [above], differing from this case rather in form than in substance, not only illustrates this but sustains our conclusions here that these deeds are perfectly valid. [Here his honor states the facts and quotes at length from the opinion in that case, and then proceeds:]

It is clear that had Susan Coburn made the same disposition by will which she did by these deeds, it would now be held valid and effective, even though the same early cases invoked here to defeat these deeds equally decided against any such limitation by will. But, as stated by Lord MANSFIELD, the literal authority of these cases was voided by ingenious distinctions, and by merely changing the name of a remainder, and calling it an executory devise; and when these remainders "came to be allowed by will or by declaration of trust, the substantial reason was the same for allowing them by deed." By the ancient common law there could be no future property, to take place in expectancy, created in goods and chattels; yet in last wills and testaments such limitations of personal goods and chattels in remainder after a bequest for life were permitted, though originally that indulgence was only shown when merely the use of the goods, and not the goods themselves, was given to the first legatee. But long before Sir William Blackstone wrote his commentaries, that distinction was disregarded; and therefore if a man, either by deed or will, limited his books or furniture to A for life, with remainder over to B, this remainder was good; unless, indeed, the property was such that its use was its consumption: 2 *Bl. Com.* *398; 1 *Broom & H. Com.* *593; 2 *Kent Com.* *352. In *Clarges* v. *Albemarle* (1691), 2 Vern. 245, and *Hyde* v. *Perrat,* 1 P. Wms. 1, this distinction between a gift of the personal chattel itself to one for life with remainder to another, and the gift of the use thereof to one for life with remainder over, was exploded, and it was held that it amounted to the same thing whether the gift was the one way or the other; for the testator's intention appeared to be the same in both cases, and ought equally in both cases to prevail: *Westcott* v. *Cady,* 5 Johns. Ch. (N. Y.) 334, 9 Am. Doc. 306. In *Langworthy* v. *Chadwick,* 13 Conn. 42, it was held that a remainder in personal chattels, dependent on an estate for life, may be created by grant or devise, and the interest so created will be protected in chancery. In *Hope* v. *Hutchins,* 9 Gill & J. (Md.) 77, the donor of personal property reserved in the deed of gift the use of the property during her life, and it was held to be valid. Now, a leasehold interest, though it be a chattel real, is still personal estate, and

there is no substantial reason why this particular species of personal property should be excluded from the operation of the rule just stated, and now recognized as governing personal property generally. We know of no principle which will or ought to prevent the application to leasehold estates of the settled doctrine which sustains the creation by deed of a life-estate in personal chattels with a remainder over; and we hold that this may be done whether the property be given for life with remainder over, or whether the property be given and a mere use for the donor's benefit during life be reserved—there being, as stated in *Westcott* v. *Cady, supra,* no substantial difference between these two modes of doing the same thing.

But there is another reason why the very old cases spoken of by Lord MANSFIELD should not be followed in this state, and that is this: Leases with covenants for perpetual renewal were never generally used in England. Lord Chancellor LIFFORD, in *Boyle* v. *Lysaght,* Vern. & S. 135, quoted by this court in *Banks* v. *Haskie,* 45 Md. 223, expressly stated that this kind of tenure was not known in England. "They had," he said, "no such tenure there." Originally in that country leases were created for very limited periods, not exceeding 40 years; though as early as the reign of Edward III, longer fixed terms were in use, but these latter terms were not extensively introduced until after the adoption of the statute of 21 Hen. VIII, c. 15 [*ante* —]: 2 *Bl. Com.* *142. Nearly all these leases were for fixed and limited terms. On the other hand, in Ireland, leases for a definite term, renewable forever, were in almost universal use. "This character of tenure is, so far as we know among the states, peculiar to Maryland. It was introduced here in colonial times, and has been a favorite system of tenure from a very early period." *Banks* v. *Haskie, supra.* It is co-extensive with the fee itself in duration, and though personal estate, it can only be conveyed as real estate is: *Bratt* v. *Bratt,* 21 Md. 583. This form of tenure being so wholly unlike that which prevailed in England, it would be unwise and highly impolitic, even if we had the power, to strike down these and all similar leases by rigidly bringing them, in this state, within the scope of a rule of the ancient common law never heretofore applied to them. We are not required by any provision of the organic law of the state to adopt such a rule here, and to subject to its operation and control a species of tenures unknown to the common law, but borrowed by the early settlers of the colony from a different system of jurisprudence. A long-established and well-understood usage has sanctioned such a conveyance, and a departure from it now would unsettle, and probably overthrow, many titles hitherto believed to be perfectly good. No question has ever been heretofore raised in this court in respect to the right to convey by deed such terms for life with remainders and limitations over. Doubtless many titles, involving vast amounts of money, are now held under just such leases as these. Cases have been before this court involving the construction of leases of this character, but the point now raised against their validity was not even suggested, though in at least

one of those cases such an objection, if made and sustained, would have been decisive against the remainders (*Winter* v. *Gorsuch,* 51 Md. 180); where the court held the limitation over a life-estate void, but because such a limitation could not lawfully be made by deed, but because the premises of the deed granted the whole term, and the *habendum,* which restricted the grant to a life-estate, and created the remainders, could not be allowed to abridge or cut down the estate given by the premises. Had it been supposed that the deed was void because repugnant to the common law, no doubt the point would have been made and passed upon. See also *Arthur* v. *Cole,* 56 Md. 107. The learned judge of the circuit court based his decree upon the construction which he placed on article 44, Rev. Code, 1878; and he concluded that the doctrine contended for by the appellant as the doctrine of the common law, had been abrogated by this legislation. We concur with his reasoning on this point, and would be content to rest our affirmance of his decree thereon if the other considerations assigned by use were not also amply sufficient. The decree appealed from will be affirmed.

Statute of New York, Mich., &c. "An estate for life may be created in a term for years and a remainder limited thereon." **N. Y.** R. S. (1828), pt. 2, c. 1, t. 2, Art. 1, § 24; **Mich.** R. S. (1846), c. 62, § 24 (1897), § 8806; **Minn.** St. (1866), c. 45, § 24, R. L. (1905), § 3213; **Wis.** R. S. (1849), c. 56, § 24, St. (1898), § 2048.

"A contingent remainder shall not be created on a term of years unless the nature of the contingency on which it is limited be such that the remainder must vest in interest during the continuance of not more than two lives in being at the creation of such remainder, or upon the termination thereof." **N. Y.** R. S. (1828), pt. 2, c. 1, t. 2, Art. 1, §20; **Mich.** R. S. (1846), c. 62, §20, C. L. (1897), §8802; **Minn.** St. 1866), c. 45, §20, R. L. (1905), §3209; **Wis.** R. S. (1849), c. 56, §20, St. (1898), §2044.

REVERSIONS.

ANON., Hilary, 22 Hen. 7, A. D. 1507—Keilwey 88b.

The opinion was that if one make a feoffment of land in fee to the use of himself and his heirs, if the feoffor make a lease for a term of years to a man rendering rent, and die, that the lease is good by the statute (1 Rich. 3, c. 1). If the heir in this case should bring an action of debt generally and show the lease made by his father, and though the reversion descended to him, and by rent becoming in arrear after the death of his father an action accrued to him, by all the court such a count would not be good, but he ought to show the feoffment made by his father to the use of himself and his heirs, and so to make a special count. And it was also said, that although the rent was reserved only to the lessor and not to his heirs, yet his heir should have it during the term, for the rent is parcel of the reversion; and as the reversion descended to the heir, so the rent though not thus limited expressly in the lease.

ANON., 3 Mary, A. D. 1556—Brooke's New Cases, pl. 470, Marsh's translation t. Feoffments to Uses, Bro. Abr. t. Feoffments to Uses 59.

If a covenant by indenture be that the son of A shall marry the daughter of C, for which C. gives A 100£., and for this A covenants with C. that if the marriage takes not effect, that A and his heirs shall be seised of 150 acres of land in D to the use of C and his heirs until A his heirs or executors repay the 100£., and afterwards C has issue within age and dies, and afterwards the marriage takes not effect, by which the estate is executed in the heir of C by the statute of uses made 27 Hen. 8, notwithstanding that C died before the refusal of the marriage, for now the use and possession vests in the heirs of C, for that the indentures and covenants shall have relation to the making of the indentures, for these indentures bind the land with the use, which indentures were made in the life of C. But by Brooke query whether the heir of C shall be in ward to the lord, for he is heir, and yet a purchaser, as it seems.

BULLEN v. GRANT, in Queen's Bench, Mich. 31 & 32 Eliz., A. D. 1591. —Cro. Eliz. 148.

Trespass. The case upon evidence was, Hugh Bullen, father of the plaintiff, being a copyholder in fee, surrenders the land to the use of his last will, and devises it to his wife for life, remainder to G, his son in tail, remainder to T, his son, in tail. The lord admits M and afterwards admits G. The wife dies. G dies without issue. T is admitted and surrenders to the use of the defendant and dies without issue. The plaintiff, before admittance, being the heir of Hugh B, enters, and upon an ouster brings trespass. It was held PER CURIAM that the heir may enter without admittance; for WRAY said when the surrender is to the use of his last will, this is at first of all the whole fee; but when he deviseth the land for life or in tail, and doth not meddle with the reversion, by this the reversion never passed out of him, to the lord, but descends to his heir, and he shall have it without any admittance. * * *

MILFORD v. FENWIKE, in the King's Bench, Mich., 32 & 33 Eliz., A. D. 1591.—1 And. 288. Same case sub nom. Fenwike v. Mitforth, Moor 284, 1 Leon. 182.

Ejectione firmae was brought in the king's bench by Margery and Mary Milford against Fenwike, in which the case was that Anthony Milford, being seised of land in fee, levied a fine of it to divers persons to the use of his wife for life, and after to the use of Jasper his son in tail, and after to the use of his right heirs; after which the said Anthony leased the land for 1000 years to said Fenwike and died, later the wife died, and the son also without issue; on which matter the doubt was if the lease was good or not. And those who argued against the lease claimed that this was a remainder to the right heirs of Anthony, and that they took the land as purchasers, and so now the

lease is determined by the death of the lessor, and on this an action would not lie. On the other side it was said that it should be a reversion; the cause of which, as it was said, was, for this, that what the said Anthony had limited in remainder in fee to his right heirs he should have in himself, and if he limit such a thing in use or possession to his heirs the limitation is void; for it may not take effect in the heir of him who limits it if not by descent. And other arguments were made on uses express and implied, * * *. And at last it was adjudged by the court, Mich. 32, 33 Eliz., that the lease was good, for this that the fee simple remained in the lessor, and was as a reversion, and they gave their reason on the cause above.

ANON., in King's Bench, uncertain time.—1 And. 256, pl. 264.

If one make a feoffment in fee to the use of himself for life, remainder over to a stranger for life in use, and after this to the use of the right heirs of the feoffor; the question was if this fee simple was to this day in the feoffor or not; and this in the nature of a reversion in him or not, or if it should be in the nature of a remainder to the heirs of the feoffor; and it was agreed by the COURT of king's bench (as the chief justice said to me), that the fee is in the feoffor, and the use limited to the heirs of the feoffor is a use of the fee in himself in the nature of a reversion; for this that it came from himself and by his own act, and not from any other; which being the law, it follows that the feoffor may sell the land, &c., and if he should die without heir of age it shall be in ward; and so here it is accounted in all cases as a reversion; see before [1 And.] case 3, but it is better, reported by Dyer in his book.

That limitation to heirs of feoffer is reversion. Jordan v. McClure (1877), 85 Pa. St. 495.

BEDINGFIELD v. ONSLOW, in Common Pleas, Easter, 1 Jac. 2, A. D. 1685.—3 Lev. 209. Abridged.

Case, and declares that plaintiff was seised in fee of a close, and defendant possessed of the adjoining one, between which closes ran a rivulet, and that defendant stopped it, and so that plaintiff's trees were drowned, and perished. Defendant pleads that the tenant holding under lease by plaintiff's father had accepted satisfaction for said trespass, to which plaintiff demurs. And after arguments at the bar, and consideration of the books of 19 Hen. 6, 12; 12 Hen. 6, 4; 2 Roll Abr. 551; *Love* v. *Piggot,* Cro. Eliz. 55; it was resolved by CHARLTON, LEVINZ, and STREET, who only were in court, that this was no plea; for the plaintiff, in respect of the prejudice done to the reversion, may maintain an action; * * * and satisfaction given to one is no bar to the other. But trespass during the plaintiff's term could not be had, it being founded merely on the possession.

METHODIST PROTESTANT CHURCH v. YOUNG, in N. Car. Sup. Ct., Feb. 18, 1902.—130 N. Car. 8, 40 S. E. 691.

Action by the Methodist Protestant Church of Henderson and others against J. R. Young and others, to quiet title. From a judgment in favor of plaintiffs. Defendants appeal.

FURCHES, C. J. On the 21st of September, 1880, in consideration of $1. W. A. Harris conveyed the land in controversy to "D. E. Young, Geo. A. Harris, and John F. Harris," trustees of the plaintiff church, "and to their successors in office, upon which to build a church for the worship of Almighty God," with full warranty against the right and claim of all other persons whatsoever. But he provided that if said church "discontinue the occupancy of said lot in manner as aforesaid, then this deed shall be null and void, and the said lot or parcel of ground shall revert to the said W. A. Harris and his heirs and assigns forever." The plaintiffs erected a church building on said lot soon thereafter, and continued to occupy and use the same as a place of worship until December, 1900, at which time, their church having increased until the building could not afford suitable accomodation for the congregation, the plaintiffs decided to build a new church; and for the reason that the location had become undesirable for a church, and for the reason that the plaintiffs thought the lot would be more valuable to sell it with the building on it than it would be to tear down the building, which they would have to do to build on the same lot, they purchased another lot near by, and built a church on that lot. In December, 1882, the said W. A. Harris died, leaving a last will and testament, and one son, W. C. Harris, and one daughter, Pattie Young, his only children, and heirs at law. By his said will he devised and bequeathed his property to his two children, in which he used the following language: To Pattie Young, "one-half of all my real and personal estate, of every kind and description, not hereinbefore disposed of." Walter C. Harris is still living, but Pattie died in October, 1892, without issue, leaving a last will and testament, in which, after making numerous other dispositions of her property, she willed in item 19 as follows: "It is my will and desire that all the rest and residue of my property, real, personal, and mixed, of which I may die seised and possessed, shall be sold and collected by my executor hereinafter named, upon such terms as to time as he may deem best." She then named the defendant Young as her executor, and he claims one-half of the property in controversy, under this nineteenth item of Pattie Young's will; and the plaintiffs for the purpose of removing this cloud upon the title, brought this action.

It will be observed that the deed from W. A. Harris to the plaintiff is an absolute fee, which may have continued forever. But it contains a condition by which this absolute estate may be defeated, which makes it an estate in fee upon condition, or, as it is called in the old books, a base or qualified fee and is sometimes called a conditional

limitation,—a condition by which the estate may be defeated or is limited. It is admitted that the condition had been broken by the plaintiff, and that W. A. Harris, if living, might enter and revest himself of the estate, and, as he is dead, that his heirs might do so. But it is contended that no one else can do so, and that at the time of the breach both W. A. Harris (the grantor) and Pattie Young being dead, Walter C. Harris being the only heir of said W. A. Harris and of Pattie Young, is the only one who could enter,—Gray, Perp., p. 6, § 12 (2),—and that since the breach of the condition, and before the commencement of this action, the plaintiff has received a quitclaim deed of conveyance from said Walter C. Harris, and is now the absolute owner of said property in fee simple; while the defendant contends that, although the breach did not take place until after the death of both W. A. Harris and Pattie Young, the said W. A. had a right or interest in said property which he could will and did will to Pattie, and that the will of W. A. gave her an interest which she could and did will to the defendant, and that the deed from Walter C. to the plaintiff only conveys a one undivided half interest therein, and that this defendant is entitled to the other half thereof. Until the breach of the condition, neither said W. A. Harris nor said Pattie Young had any interest or estate in this property. The absolute estate was in the plaintiff, and therefore could not be in any one else. Neither W. A. nor Pattie ever had an estate, an interest nor even an expectancy in this property, as an heir may have in the estate of his ancestor, as by reason of natural causes the ancestor must die, and the law declares his heirs, to whom his estate will descend. But in this case there was nothing to limit the estate of the plaintiff, and until the breach the grantee had the same rights as if it was a fee simple. 2 Chit. Bl. *109, *110, note 15; Id. *155-*157; Gray, Perp., supra. And the grantor having nothing, he could convey nothing by his will, and Pattie had nothing to convey by her will. Suppose that A. is the next of kin and heir at law of B., and A. should die. His children would be the next of kin and heirs at law of B. A. dies in the lifetime of B. leaving a last will and testament, in which he willed to C. (item 19) as follows: "It is my will and desire that all the rest and residue of my property, real, personal, and mixed, of which I may die seised and possessed, shall be sold and collected by my executor hereinafter named," —and named Y. as his executor. After the death of A., B. dies intestate. Would it be contended that the estate coming to A.'s children from B.'s estate passed to C. by A.'s will? It most certainly would not, for the reason that A. had no interest in B.'s estate at the time of his death. And for the same reason the will of W. A. Harris passed no title, estate, or interest to Pattie in the property in controversy, because he had no interest in it to convey, and Pattie's will passed nothing to the defendant.

It seems that it is hardly denied by the defendant but what at the common law the estate in the land in controversy would have reverted

to the heir at law, Walter C. Harris, upon condition broken. But he contends that this is changed by the act of 1844 (Code, § 2141), which makes the will speak from the death of the testator, and by the provisions of section 2140 of the Code. Other clauses are relied upon by the defendant to sustain his contention, but the following paragraph seems to be most nearly in point, and controls the others, if any of them bear upon the question, and that is as follows: "And also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estate, interest and rights respectively, and other real and personal estate as the testator may be entitled to at the time of his death." This evidently means rights of entry for conditions broken in the lifetime of the testator, and where he had the right of entry while living. This seems to us manifestly the proper construction of this statute,—such rights as he has "at the time of his death." And besides this being manifestly the proper construction of the statute, it puts the statute in harmony with the plainest principles of law governing the rights of property, as it cannot be supposed that the legislature intended to authorize a testator to will what he did not have.

Our opinion, then, is that at the death of W. A. Harris he had no interest in the property in controversy, and no interest therein passed to Pattie Young by his will. And of course, if W. A. Harris had no interest, none passed to her under the will of W. A. Harris, nor could she inherit what her father did not have; and she had nothing to will to the defendant Young, and he has no interest in the same. Our opinion, further, is that upon the breach of the condition in 1900 the right of entry and the estate in the land in controversy reverted to Walter C. Harris, the only heir at law of the grantee, W. A. Harris, at the time of the breach, and that, as plaintiff has acquired the title of W. C. Harris in and to said land, it is the absolute owner thereof in fee simple

The judgment below is affirmed.

MONTGOMERY, J., did not sit on the hearing of this appeal.

DOUGLAS, J. (concurring only in the result). I cannot agree with the opinion of the court that until the breach of condition "the absolute estate was in the plaintiff, and therefore could not be in any one else." The deed of W. A. Harris to the plaintiff conveyed a determinable fee, having the incidents of a fee simple, except that of alienation, but liable to be entirely defeated. By its very terms it could never be enlarged into a fee simple absolute, except, of course, by the release of the grantor or his heirs. It contained no inherent power of enlargement. It is true, such an estate is sometimes called a fee simple limited or conditional, which always seemed to me a misnomer; but it can never be an absolute fee. If it were, nothing would remain in the grantor, and hence no one could take advantage of the possible defeasance. There must remain in the grantor at least a possibility of reverter, which, while not an estate, is in itself a right, coupled with the contingent right of entry. This right may be in abeyance, but if it exists at all, actually or po-

tentially, it must exist in the grantor. It seems to me that the possibility of reverter is also an interest in the land, and thereby, by a double title, comes within the provisions of section 2140 of the Code. The word has been thus defined: "Interest means concern; also, advantage; good; share; portion; part; participation; any right in the nature of property, but less than title. Its chief use seems to designate some right attaching to property which either cannot or need not be defined with precision." 16 Am. & Eng. Enc. Law (2d Ed.) 1102. Coke says: "Interest, *ex vi termini,* in legal understanding, extended to estates, rights, and titles that a man hath of, in, to, or out of lands; for he is truly said to have an interest in them." Co. Litt. 345a. Interests may be vested, executory, or contingent. In *Young* v. *Young,* 89 Va. 675, 17 S. E. 470, 23 L R. A. 642, it was held that a contingent remainder was an interest or claim to real estate, and might be disposed of by deed or will under a statute using those terms. In fact, the word seems to be one of extreme elasticity, which may be used to include nearly everything legally connecting the claimant with the subject-matter. Section 2140 of the Code provides that: "Any testator * * * may dispose of all real and personal estate, which he shall be entitled to at the time of his death; * * * and the power hereby given shall extend to all contingent, executory or other future interest in any real or personal estate, whether the testator may or may not be the person or one of the persons, in whom the same may become vested, or whether he may be entitled thereto under the instrument by which the same was created, or under any disposition thereof by deed or will; and also to all rights of entry for condition broken, and other rights of entry," etc. It would be difficult for one to make the language of the statute any broader; and I cannot doubt that it includes, and was intended to include, all contingent, executory, or other future interests, as well as all rights of entry, whether vested or contingent. The possibility of reverter is a contingent interest, which becomes vested upon condition broken. Upon entry the grantor or his heir is remitted to his former estate, and the reversion, of course, becomes merged into the fee. I see no reason of public policy why the statute should exclude a possibility of reverter, with its contingent right of entry, from the power of testamentary disposition, but a very strong reason why it should be included. In England, the home of the common law, the rule of primogeniture made the entry of the heir a very simple matter, as there was practically but one heir; but here it is different. Determinable fees may last for a very long time, and the grantor may have a large number of descendants scattered over the country. Must they all enter upon condition broken, or can one enter for all and hold as tenant in common? These are questions difficult of solution and inconvenient of application, which may be avoided by testamentary disposition. I am therefore forced to the conclusion that the possibility of reverter could have been devised by either the grantor or his daughter, Pattie, but whether it can be brought within the terms of the will of the latter is a different question. I am not prepared to say that a person

"may die seised and possessed" of a possibility of reverter. If it did not pass by Pattie's will, it went to Walter, as Pattie's heir, and was by his deed conveyed to the plaintiff. I am thus brought to the conclusion of the court.

Accord: 4 Kent Com. *511; Deas v. Horry (1835), 2 Hill (S. Car.) 244, 249.

In Austin v. Cambridgeport Parish (1838), 38 Mass. (21 Pick.) 215, the interest of the grantor under a deed conveying land in fee subject to a condition subsequent was held to be a devisable interest before breach, and the devisee's action to recover was sustained.

D conveyed a strip of land to a railway company for its tracks, on express condition that the road should be built by a time named. Before the time expired D conveyed all the land to Nicoll including by general terms the strip previously conveyed, but subject to the right of the railway company. The road not having been built by the time specified, Nicoll brought ejectment to recover the strip. The court held that D parted with all his interest, having only a possibility of reverter, not transferable; and that therefore he could not by deed made before condition broken pass any right to the plaintiff. Various statutes claimed to enable such transfers were held not to have that effect. Nicoll v. New York & E. Ry. Co. (1854), 12 N. Y. 121, Pattee Cas. 471, Finch Cas. 527.

Mrs. Davey conveyed land to Bishop Hughes on condition that he consecrate the property or cause it to be consecrated, and cause a church to be built upon it within a reasonable time. Mrs. D died later leaving her will, by which she gave to a residuary devisee all property and estate real and personal not previously effectively disposed of. Her heir brought ejectment against Hughes' successor, Corrigan, for breach of the condition, 29 years having passed and no church built. The defense was that the possibility of reverter passed by Mrs. D's will, but the court held that she had no devisable interest, and judgment for plaintiff was affirmed. Upington v. Corrigan (1896), 151 N. Y. 143, 45 N. E. 358, 37 L. R. A. 704, Finch. 533.

H. Venable conveyed land to trustees to be conveyed by them to a corporation in fee for an academy as soon as the corporation should be formed. The corporation was formed and deed to it made by the trustees. Later H. V. died devising all his estate to his wife. Later the corporation lost its charter on quo warranto; and the plaintiff, claiming under quit claim deed from the widow devisee, sued in ejectment, claiming that the possibility of reverter passed by the will. The court cited Nicoll v. New York & E. Ry. Co., above, and held that at the death of the testator he had no interest but a mere possibility of reverter, a thing not devisable. Judgment for plaintiff, reversed. Trustees of Presbyterian Church v. Venable (1896), 159 Ill. 215, 42 N. E. 836.

CHAPTER IX.

RULE AGAINST PERPETUITIES.

EDWARD PELLS v. WILLIAM BROWN, in B. R., Hilary, 17 Jac. 1, A. D. 1620.—Cro. Jac. 590, 2 Roll 196, 216, 5 Gray's P. C. 163. Given according to Croke.

Replevin for the taking of three cows at Rowdham. The defendant justifies for *damage fesant* as in his freehold. The plaintiff traverseth the freehold; and, thereupon, being at issue, a special verdict was found, in which the case appeared to be, that one William Brown, father of the defendant, being seised of this land in fee, having issue the defendant, his son and heir, and Thomas Brown his second son, and Richard Brown a third son, by his will in writing devised this land to "Thomas his son and his heirs forever, paying to his brother Richard twenty pounds at the age of twenty-one years; and if Thomas died without issue, living William his brother, that then William his brother should have those lands to him and his heirs and assigns forever, paying the said sum as Thomas should have paid." Thomas enters and suffers a common recovery, with a single voucher, to the use of himself and his heirs; and afterwards devises it to the use of Edward Pells, the plaintiff, and his heirs; and dies without issue, living the said William Brown, who entered upon Edward Pells, and took the distress.

This case was twice argued at the bar and afterward at the bench; and the matter was divided into three points; 1, whether Thomas had an estate in fee, or in fee-tail only; 2, admitting he had a fee, whether this limitation of the fee to William be good to limit a fee upon a fee; 3, if Thomas hath a fee, and William only a possibility to have a fee, whether this recovery shall bar William, or that it be such an estate as cannot be extirpated by recovery or otherwise.

As to the first, all the justices resolved, that it is not an estate tail in Thomas, but an estate in fee; for it is devised to him and his heirs forever, and also paying to Richard twenty pounds; both which clauses show that he intended a fee to him. And the clause "if he died without issue," is not absolute and indefinite whensoever he died without issue, but it is with a contingency, "if he died without issue, living William;" for he might survive William, or have issue alive at the time of his death, living William; in which cases William should never have it, but is only to have it if Thomas died without issue living William, See 19 Hen. 6, pl. 74; 12 Edw. 3, pl. 8; *Berisford's Case,* 7 Coke 41; *Lampet's Case,* 10 Coke 50. And therefore it is not like to the cases cited on the other part: 5 Hen. 5, pl. 6. 37 Assize, pl. 15 & 16; and Dyer 330, *Clactey's Case:* for it is an exposition of his intent what issue should have it, viz. of his body; and whensoever he died without issue,

the land should remain, &c. But here it is a conditional limitation to another, if such a thing happen; and therefore they all relied upon the book, Dyer, 124, and Dyer 354; which are all one with this case.

Secondly, they all agreed that this is a good limitation of the fee to William by way of that contingency, not by way of immediate remainder (For they all agreed it cannot be a remainder: as if one deviseth land to one and his heirs, and if he die without heir, that it shall remain to another, it is void and repugnant to the estate; for one fee cannot be in remainder after another; for the law doth not expect the determination of a fee by his dying without heirs, and therefore cannot appoint a remainder to begin upon determination thereof, as 19 Hen. 8, pl. 8; 29 Hen. 8, Dyer 33 a [*ante* p. —], but by way of contingency, and by way of executory devise to another, to determine the one estate, and limit it to another, upon an act to be performed, or in failure of performance thereof, &c.; for the one may be and hath always been allowed: as devise of his land to his executors to sell, if his heir fail of payment of such a sum at such a day, this is an executory devise. So the case cited in *Boraston's Case,* 3 Coke 20 [reported *ante* p. —], of *Wellock* v. *Hammond* [reported *ante* p. —], where the devise was to the eldest son and heirs, paying such a sum to the younger sons, otherwise that the land should be to him and his heirs, is a good executory devise. And a precedent was shown, Trinity term, 38 Eliz. Roll 867, *Fulmerston* v. *Steward;* where upon special verdict it was adjudged, that whereas Sir Richard Fulmerston devised to Sir Edward Cleere and Frances his wife, daughter and heir of the said Sir Richard Fulmerston, certain lands in Elden in the county of Norfolk, to them and the heirs of Sir Edward Cleere, upon the condition that they should assure lands in such places to his executors and their heirs, to perform his will; and if he fail, then he devised the said lands in Elden to his executors and their heirs. It was adjudged to be a good limitation and no condition; for if it should be a condition it should be destroyed by the descent to the heir; but it is a limitation, and as an executory devise to his executors, who for the non-performance of the said acts entered and sold, and adjudged good. So here, &c. For it is a good executory devise upon this limitation, and DODERIDGE said the opinion 29 Hen. 8, Dyer 33 a [*ante* p. —], was, that such limitation in fee upon an estate in fee cannot be, and it had been oftentimes adjudged contrary thereto.

To the third point DODERIDGE held that this recovery should bar William; for he had but a possibility to have a fee, as if a contingent estate which is destroyed by this recovery before it came *in esse;* for otherwise it would be a mischievous kind of perpetuity, which could not by any means be destroyed. And although it was objected that a recovery shall not bar, but where a recovery in value extends thereto, as appears by *Capel's Case,* 1 Coke 62 a, where a rent charge granted by him in remainder was bound; yet he held that this recovery destroying the immediate estate, all contingencies and dependencies thereupon are bound, and a recovery shall bind everyone who cannot falsify it; and

here he who hath this possibility cannot falsify, therefore he shall be bound thereby. But all the other justices were herein against him, that this recovery shall not bind; for he who suffered the recovery had a fee, and William Brown had but a possibility if he survived Thomas; and Thomas dying without issue, in his life, no recovery in value shall extend thereto, unless he had been party by way of vouchee, and then it should; for by entering into the warranty he gave all his possibility; therefore they agreed to the case which Damport at the bar cited to be adjudged, 34 Eliz., where a mortgagee suffers a recovery it shall not bind the mortgagor; but if he had been party by way of voucher it had been otherwise. And here is not any estate depending upon the estate of Thomas Bray, but a collateral and mere possibility, which shall not be touched by a recovery; and if such recovery should be allowed, then if a man should devise that his heir should make such a payment to his younger sons, or to his executors, otherwise the land should be to them; if the heir by recovery might avoid it, it would be very mischievous, and might frustrate all devises; and there is no such mischief that it should maintain perpetuities, for it is but a particular case, and upon a mere contingency, which peradventure never may happen, and may be avoided by joining him in the recovery who hath such a contingency; and on the other part it would be far more and a greater mischief that all executory devises should by such means be destroyed.

HOUGHTON, J., in his argument, put this case: if a man give or devise lands to one and his heirs as long as J. S. hath issue of his body, he shall not by recovery bind him who made this gift without making him a party by way of vouchee; for a recovery against tenant in fee simple never shall bind a collateral interest, title or possibility, or a condition or covenant, or the like. Wherefore they all (except DODERIDGE) held that this recovery was no bar.

Then DODERIDGE took exception to the verdict that the lands were not found to be holden in socage; for otherwise it might be intended to be holden in knight-service, and so it shall be intended, and then the devise is void for a third part. And so it was resolved 24 Eliz., Dyer, that it ought to be shown that the land was holden in socage, otherwise the devise was not good for the entire; but *all the judges* held it not to be material, as this case is, for the issue is whether it was the freehold of William Brown, who is found to be the heir of the devisor; then although it were admitted that the land was held by knight-service, yet he hath the entire: viz. two parts by the devise and a third part by descent. Wherefore the tenure is not material as this case is. And it was adjudged for the defendant.

CHILD v. BAYLIE, in Exchequer Chamber, Hilary, 20 Jac. 1, A. D. 1623, on error from judgment of King's Bench, Hilary, 15 Jac. 1.—Cro. Jac. 459, Palmer 333, 2 Rolle 119, W. Jones 15, 5 Gray P. C. 495.

EJECTMENT of a lease of Thomas Heath of lands in Alchurch.

Upon not guilty pleaded, a special verdict was found upon the case; which was, that William Heath, possessed of a lease for seventy-six years of the land in question, let it to one Blunt from the day of his death until the first of May, 1629 (which was three months before the end of the lease), if Dorothy his wife lived so long. Afterwards he devised, that William Heath his son and his assigns should have the said tenements, and the reversion of them, and all his title and interest in the said tenements, for all the others of the said seventy-six years which should be unexpired at the time of his wife's death, "provided, that if the said William die without issue living at the time of his death, that Thomas his son (the now lessor) should have it for all the residue of the seventy-six years unexpired from the death of his said wife, and of William without issue; and if he died without issue, then to his daughters;" and made his wife his executrix, and died. The wife assented to the legacies; William assigned all this lease and his interest thereto to the said Dorothy, who assigned it to Mr. Comb, under whom the defendant claims; afterwards Dorothy died, and then William died without issue. Thomas the devisee enters, and makes this lease to the plaintiff.

After divers arguments at the bar, it was adjudged for the defendant.

First, it was resolved, where a lessee for years let it after his death until the first of May, 1629, that it was a good lease, which began immediately by his death, he dying within that time.

Secondly, that the lease being made to begin after his death unto the first of May, 1629, the lease being made (12 August, 1553), if Dorothy his wife should so long live, he did not thereby convey the interest and remainder of the term, viz. from the first of May, 1629, to 12 August, 1629, and the possibility of a long term if Dorothy died before the first of May, 1629, which interest and possibility together he might devise to William Heath his son.

The third and main question was, whether this devise being to William Heath and his assigns, with a *proviso,* that if he died without issue living, that Thomas Heath should have it, and he aliens it, and afterwards dies without issue, whether this alienation shall bind Thomas Heath, or that he may avoid it?

It was resolved, that this alienation shall bind; for when he limited to him and his assigns, all the estate was vested in him, and he had an absolute power to dispose thereof; for the law doth not expect his dying without issue. The difference therefore is, where a lease is devised to one *if he live so long,* and afterwards to another, the first hath but a qualified estate, and the other hath the absolute interest, and therefore this alienation shall not prejudice him who hath the absolute estate; but when it is limited to him and *his assigns,* then the proviso thereto

added, is void to restrain the alienation: and the limitation to the heirs of the body, and the proviso, are all one; for all long leases would be more dangerous than perpetuities: and therefore this case differs from the cases in 8 Co. 96, and 10 Co. 46, *Lampet's Case,* that a devisee for life could not bar him in remainder: and *Lewknor's Case* [easter term, 14 Jac. 1, 1 Roll. Rep. 356], the exchequer chamber, was cited. Wherefore it was adjudged for the defendant.

Note.—Upon this judgment a writ of error was brought in the Exchequer Chamber; and the error assigned in point of law, that the remainder of this term limited to Thomas Heath after the death of William without issue then living, was good, and the alienation of William shall not bind him in remainder.

It was argued by *Bridgman,* and afterward by *Humphrey Davenport,* for the plaintiff in error, that it was a good limitation of the remainder of the term to William and his assigns, with the *proviso,* that if he died without issue then living, the then remainder should be to Thomas, &c., and that it is no more in effect than after his death; and therefore it differs from *Lewknor's Case,* adjudged in the Exchequer, where a devise of a term to one, and the heirs of his body, and if he die without issue, that it shall remain to another, was held to be a void remainder; for he cannot limit a remainder upon a term after the death of another without issue, but here it is but a remainder after the death of one without issue, viz. William dying without issue then living; so upon the matter it depended upon is death, and therefore not like to the said case; but it is agreeable to the reasons put in the cases of 8 Co. 94, *Matth. Manning's Case, and* 10 *Co.* 46.

But it was now argued on the other part by *Thomas Crew* and *George Croke,* that the judgment was well given in the King's Bench; for here the limitation being to William after the death of the devisor's wife, of all his estate and interest to him and his assigns, it is but a remainder; for the wife may outlive all the term, and then this devise of the remainder of the term is given to him in particular, and William hath but a possibility; and then to limit it to Thomas after the death of William then living, is to limit a possibility upon a possibility, which is against the rules of law, as it is held in the *Rector of Chedington's Case,* 1 Co. 156, and *Lord Stafford's Case,* 8 Co. 73.

Secondly, that this limitation to Thomas after the death of William without issue then living, is all one as if it had been limited upon his death without issue: and the addition *"then living,"* doth not alter the case; for at the first limitation, *non constat* that he should die without issue; and the law shall not expect his death without issue; and it is not like to the case when it is limited after the death of one; for it is certain that one must die, and it may be that he may die during the term, and the law may well expect it; but that one should die without issue, the law will never expect such a possibility, nor regard it: and it would be very dangerous to have a perpetuity of a term in that manner; for it would be more mischievous than the common cases of perpetuities

which the law hath sought to suppress: and therefore it was said, that this case was like to some of the cases which had been adjudged, that the remainder of a term after the death of one person is good, and should not be destroyed by the alienation of the first devisee. *Vide* 8 Co. 94, *Manning's Case;* 10 Coke, *Lampet's Case;* [*Welcden* v. *Elkington*], Plowd. Com. 520 and 540; Dyer 74, 277.

After divers arguments, all the judges of the Common Pleas, viz. HOBART, WINCH, HUTTON, and JONES, and all the Barons (except TANFIELD, Chief Baron) agreed with the first judgment: for they said: that the first grant or devise of a *term* made to one for life, remainder to another, hath been much controverted, whether such a remainder might be good, and whether all may not be destroyed, by the alienation of the first party; and if it were not first disputed, it would be hard to maintain; but being so often adjudged, they would not now dispute it.—But for the case in question, where there was a devise to one and his assigns, and if he died without issue then living, that it would remain to another, it is a void devise; and it is all one as the devise of a term to one and his heirs of his body, and if he die without issue, that then it shall remain to another, it is merely void; for such an entail of a term is not allowable in law, for the mischief which otherwise would ensue, if there be such a perpetuity of a term. And although TANFIELD, Chief Baron, doubted thereof, especially by reason of a judgment given before in the King's Bench in *Rethorick* v. *Chappel,* Hil. 9 Jac. 1, 2 Bulst. 28, Godol. 149, where "William Cary possessed of a term for years devised it to his wife for her life, and afterwards that John his son should have the occupation thereof as long as he had issue; and if he died without issue unmarried, that then Jasper his younger son should have the occupation thereof as long as he had issue of his body; and if he died without issue unmarried, he devised the moiety to Dorothy his daughter, the other moiety to Robert and William his sons, and made his wife executrix, who assented to the legacies and died. John and Jasper died without issue, unmarried; and afterward Robert and William entered upon the defendant, claiming the moiety, and let to the plaintiff. Upon a special verdict, all this matter being discovered, it was adjudged for the plaintiff, that he should recover the moiety, which is all one case with the case in question. But the defendant's counsel in the writ of error showed, that there was a difference betwixt the said cases: for, First, in that there is a devise but of the occupation only; but here, of the term itself. Secondly, it is a devise here of his estate and term to him and his assigns, wherein is authority given that he may assign. Thirdly, the limitation is there, if he die without issue unmarried, which is upon the matter, that if he die within the term; for if he be not married he cannot have issue"—but in the case here, he might have issue; and yet if that issue should die without issue in his life-time, it should remain; which the law will neither expect nor will suffer: yet the JUSTICES AND BARONS, by the assent of TANFIELD, all agreed, that judgment should be affirmed: and in Hilary Term, 20 Jac. I., it was affirmed.

DUKE OF NORFOLK'S CASE, in Chancery, High Court of Chancery, and House of Lords,—reported in 3 Chancery Cases 1-54, and partially reported in 5 Gray's P. C. 498. Abridged from 3 Ch. Cas.

This case was argued by counsel in the court of chancery, Dec. 26, 1677, and at other times afterwards; the opinions of the judges and the first opinion of the Lord Chancellor were delivered March 24th, 1682; the opinion of the Lord Chancellor on re-hearing was delivered and final decree entered June 17th, 1682; which decree was reversed in the High Court of Chancery by the Lord Keeper of the great seal of England, on bill for review, May 15th, 1683; and this last decree was reversed and the decree of the Lord Chancellor affirmed by the House of Lords, after argument, on petition and appeal, June 19th, 1685.

This is a bill in chancery by Charles Howard against his brother Henry Howard, Duke of Norfolk, and others, to establish and have execution of trusts created by two deeds executed by their father (Henry Frederick, Earl of Arundel and Surrey), March 20 & 21, 1647. Being seised of the baronies of Grostock and Burgh in fee, after a term for years, and having sons as follows—Thomas Lord Maltravers (*non compos mentis*), Henry (now Duke of Norfolk and defendant herein), Charles (plaintiff herein), Edward, Francis, and Bernard, and having a daughter, Lady Katharine—the father made the deeds above mentioned, to provide settlement for his estates and family. By the first of these deeds he granted the reversion of these baronies to the Duke of Richmond, Marquis of Dorcester, and others, and their heirs, to the use of the father for life, then to the use of his wife for her life, remainder to these trustees for 200 years, for the trusts created by the other deed, remainder to the use of Henry and the heirs male of his body, with like remainders in tail to Charles, Edward, and the other brothers, successively. The other deed was made to declare the trusts of the term for 200 years; and that declares that it was intended this term should attend the inheritance, and that the profits thereunder should be received by Henry and the heirs of his body so long as Thomas or any issue male of his body should live, and if he should die without issue, in the life of Henry, and not leave his wife pregnant with a son, or if after his death the dignity of Earl of Arundel should descend on Henry; then Henry or his issue should have no farther benefit or profit of the term of 200 years, but then the terms shall be in trust for Charles and the heirs male of his body, remainder to Francis and the heirs male of his body, remainder to Bernard and the heirs male of his body, remainder to Henry and the heirs male of his body, remainder to the heirs of the father making the deed.

The father died in 1652; his wife died in 1673; the Marquis of Dorcester, surviving trustee, assigned his estate to Marriot, in 1675; later Marriot assigned it to Henry now Duke of Norfolk, and Henry by bargain and sale enrolled sold to Marriot to make him tenant to a præcipe, Oct. 24, 1675, and next day a deed was made declaring the

recovery to be to the use of Henry and his heirs, the recovery was suffered accordingly; later Thomas died without issue and unmarried, in Nov. 1677; by whose death the earldom of Arundel as well as the dukedom of Norfolk descended to Henry; and thereupon this bill was filed by Charles to have execution of the trust in his favor.

The case was argued by several eminent counsel on each side, and these arguments are reported at some length in 3 Ch. Cas. 1-13. LORD CHANCELLOR NOTTINGHAM was assisted at the hearing by LORD CHIEF BARON MONTAGUE of the exchequer, LORD CHIEF JUSTICE NORTH of the common pleas, and LORD CHIEF JUSTICE PEMBERTON of the king's bench. The better parts of their several opinions delivered when they met, March 24, 1681, the day appointed for judgment in the cause, are given below.

MONTAGUE, C. B. [* 15] * * * The plaintiff's bill is to have execution of the trust of the term of the barony of ————, to the use of himself and the heirs male of his body. This I conceive was opposed by the counsel for the defendant upon these grounds: 1. That by the assignment made by Marriot to my Lord Duke Henry, the term was surrendered and quite gone. 2. The second ground was the common recovery suffered, which they say barred the remainders which the other brothers had, and so also would be a bar to the trust of this term. 3. And the other ground was, that the trust of a term to Henry and the heirs male of his body, until, by the death of Thomas without issue, the earldom should descend upon him, and then to Charles, is a void limitation of the remainder.

As to the first, that by the assignment of Marriot to Henry Howard, the whole term was surrendered, and being so surrendered, hath no existence at all; that I find was barely mentioned, and I think cannot be stood upon. For this, the term by surrender is gone indeed and merged in the inheritance; yet the trust of that term remains in equity; and if this trust be destroyed by him that had it assigned to him, this court has full power to set it up again, and to decree the term to him to whom it did belong, or a recompense for it. Therefore, I think that stands not at all as a point in the case, or as an objection in the way. [On this point the chancellor and other judges agreed with Montague.]

[*16] As to the next thing, the common recovery now suffered by the now duke, that doth bar the remainders to the other brothers, and also the trust of this term? That I conceive to be so in case this can be interpreted to be a term to attend the inheritance; and indeed in the reciting part the deed doth seem to say that it was intended to attend the inheritance. But by that part of the deed which followeth after *now this indenture witnesseth*, there it is limited that the term should be to Henry Howard and the heirs male of his body until such time as the honor of the Earl of Arundel, by his elder brother's death without issue, should come to him; then to the plaintiff, which doth convey the estate of the term in a different channel from that in which

the inheritance is settled; and taking this deed all together, it doth limit this term in such various estates, that it can no way be construed to be a term attending the inheritance; and then, I conceive, the recovery doth not bar the trust. For the recovery would bar the incident to any estate, as this would do here, if it attended the inheritance; but being only a term in gross and a collateral thing, I conceive the recovery has no operation to bar the trust in the term. [On this point the other judges agreed with Montague.]

Then the case singly depends upon the third point: Whether the trust of a term thus limited to Henry Howard and the heirs males of his body until his brother die without issue, whereby the honor came to him, with such contingent remainders over, be a good limitation—this is the question. * * * I am of opinion that these limitations to the younger brothers upon this contingency are absolutely void in the first creation, and are gone without the surrender; and that upon this recovery Henry Howard, now Duke of Norfolk, ought to have the trust of the whole term. The expositions of devises of terms, or the dispositions of the trusts of terms, have proceeded by many steps to higher degrees than was at first thought of by the makers. It would be too long to give a distinct history of it; but it is so plain that it is now a resolved and decreed thing and settled, therefore, it were in vain to tell you the steps taken towards it. That the devise of a term and the limitation of a trust of a term to one and the heirs of his body is good, though *Burgess's Case* was only for life, the cases are very full in it. On the other side, where there is a limitation of a term to one and the heirs of his body, there a positive limitation of the estate over, after his death without issue, that I think also is as fully declared to be void. [Here his honor reviewed the cases of *Jenkins* v. *Kennish,* in the exchequer; *Leventhorp* v. *Ashby* (11 Car. 1, in King's Bench), 1 Rolls Abr. 611; *Sanders* v. *Cornish,* Cro. Car. 230] [*18]. But now the doubt in this case that is made ariseth upon this point, that this limitation over to the brothers is upon a mere contingency, and whether that be good, I think, is the main question. And truly, upon the reasons of *Child* and *Bailie's Case* [ante p], I cannot think it is a good limitation. [Here his honor reviewed *Child* v. *Bailie; Rhetorick* v. *Chappell,* noted in *Child* v. *Bailie; Gibson* v. *Sanders* ; *Jay* v. *Jay,* Stiles 258, 274; and *Pells* v. *Brown, ante* —]. * * * If you admit a limitation of a term after an estate tail, where shall it end? For if after one, it may as well be after two; and if after two, then as well after twenty. For it may be said if he die within twenty years without issue; and so if within 100 years; and there will be no end, and so a perpetuity will follow. It was said at the bar, it will be hard to frustrate the intention of the parties. To that I answer, intentions of parties not according to law are not to be regarded. It was the intention in *Child* and *Bailie's Case,* that the younger son should have it; and so in *Burgess's Case* it was the intention the daughter should have it. * * * [*20] It has also been objected, but then here is a contingency that has actually happened,

upon Thomas's death without issue and so the honor is come to Henry. I say the happening of the contingency is no ground to judge. * * * So then for that I think these expositions have gone as far already as they can; for my part I cannot extend it any further. And therefore I conceive in this case, the plaintiff has no right to this term, but the decree ought to be made for the defendants.

NORTH, C. J., * * * I conceive the rules of law to prevent perpetuities are the policy of the kingdom, and ought to take place in this court as well as any other court. So I take it then, that the trust of a term is as much a chattel, and under consideration of this court, as the term itself. And, therefore, I cannot see why the trust of a term upon a voluntary settlement should be carried further in a court of equity than the devise of a term in the courts of [*21] common law. * * * Now let us see, and a little consider what those rules are, and how they are applicable to this case. * * * It is clear there can be no direct remainder of the trust of a term upon an estate-tail. The question then is, whether there can be any contingent remainder, for this case depends upon that consideration; that is, it is limited upon a contingency, if such a thing should happen in the life of a man, and so it is a springing trust and good that way. My lord, I take it in this case, where there can be no direct remainder there can be no contingent remainder, though it happen never so soon. Therefore, if a term be limited to one and his heirs of his body, and he die without issue of his body within two years the remainder over, there can be no remainder over, there can be no such remainder limited at all, and therefore no contingent remainder; for this remainder is limited at the end of an entail, and that is so remote a consideration, that as the law will not suffer a direct remainder upon it, so upon a contingency neither. * * * [* 22] * * * The rule in *Child and Bailie's Case* [ante p.] is firm, that the expiring of the limitation of a term in tail without the life of a man will not make good a limitation of the remainder over; which I hold to be a good rule; and the reason of it, I conceive, will reach to this case. * * * So that I think the whole term is swallowed in the estate-tail upon this consideration; and there can be no remainder of it, no executory devise, nor any springing trust to Charles upon this contingency. And, my lord, upon that reason, I think this settlement fails, and is disappointed as to the younger brothers. * * *

[*23] PEMBERTON, C. J. * * * I do first think that the Earl of Arundel did certainly design, that if my Lord Maltravers should die without issue male, whereby the honor of the family should come to my lord duke that now is, Charles should have this estate; and his intentions are manifest by creating this term, which could be of no other use but to carry over this estate to Charles a younger son, upon the elder son's dying without issue. And I do think truly that this was but a reasonable intention of the father. For there being to come with

the earldom a great estate that would well support it, it was but reason, and the younger sons might expect it, that their fortunes might be somewhat advanced by their father in case it should so happen. It was a reasonable expectation in them; and truly I think it was the plain intention of the earl. And there is no great question but it might have been made good and effectual by the limitation of two terms; for if one term had been limited to determine upon the death of Thomas without issue, and that to be for the now Duke of Norfolk, and another term then to commence and go over to Charles, that would certainly have been good and carried the estate to Charles upon that contingency. But as this case now is, I do think that this way that is now taken is not a good way nor a right way; for I take this limitation to Charles to be void in law. And as to that I know there is a famous difference of limiting terms that are in gross, and terms that attend the inheritance. As to terms that are in gross, I think it will be granted (because it hath been settled so often) they are not capable of limitation to one after the death of one without issue. * * * This term here doth partake somewhat of a term in gross, and somewhat of a term attendant upon an inheritance; and if there should be such a limitation admitted such a foreign limitation as this is (I call it foreign, because [*25] it is not that which goes along with the inheritance)—if that be allowed, we know not what inventions may grow upon this. For I know men's brains are fruitful in inventions, as we may see in *Matthew Manning's Case* [ante p.]. It was not foreseen nor thought when that judgment was given, what would be the consequence, when once there was an allowance of the limitation of a term after the death of a person. Presently it was discerned, there was the same reason for after twenty men's lives as after one; and so then it was held and agreed, that so long as the limitation exceeded not lives in being at the creation of the estate it should extend so far. That came to grow upon them then; and now if this be admitted, no man can foresee what an ill effect such an ill allowance might have. There might such limitations come in as would encumber estates, and mightily entangle lands. This is certain, such an allowed limitation would add a greater check to estates than ever was made by limitations of inheritance; for when an estate of inheritance was limited to a man and his heirs males of his body, with remainders over, and a term was limited accordingly to wait upon the inheritance; in that case, he that had the first estate-tail, had full power over the term, to alienate it if he pleased. * * * But now if this limitation in question were good, then Henry could not part with it; because it is to him and his heirs males of his body under a collateral limitation of his brother's dying without issue. * * *

Lord Chancellor Nottingham. * * * These indentures are both sealed and delivered in the presence of Sir Orlando Bridgman, Mr. Edward Alehorn, and Mr. John Alehorn, both of them by Lord Keeper Bridgman's clerks; I knew them to be so. This attestation of these

deeds is a demonstration to me they were drawn by Sir Orlando Bridgman. * * *

The whole contention in the case is to make the estate limited to Charles void—void in the original creation; if not so, void by the common recovery suffered by the now duke, and the assignment of Marriot. If the estate be originally void, which is limited to Charles, there is no harm done. But if it only be avoided by the assignment of Marriot, with the concurrence of the Duke of Norfolk, he having notice of the trusts, then most certainly they must make it good to Charles in equity; for a palpable breach of trust of which they had notice. [*28] So that the question is reduced to this main single point, whether all this care that was taken to settle this estate and family, be void and insignificant; and all this provision made for Charles and the younger children to have no effect.

I am in a very great strait in this case. I am assisted by as good advice as I know how to repose myself upon; and I have the fairest opportunity, if I concur with them, and so should mistake, to excuse myself, that I did *errare cum patribus*. But I dare not at any time deliver any opinion in this place, without I concur with myself and my conscience too. * * * Whether this limitation to Charles be void or no is the question. Now, first, these things are plain and clear; and by taking notice of what is plain and clear, we shall come to see what is doubtful: 1. That the term in question, though it were attendant upon the inheritance at first; yet upon the happening of the contingency, it is become a term in gross to Charles. 2 That the trust of a term in gross can be limited no otherwise in equity than the estate of a term in gross can be limited in law; for I am not setting up a rule of property in chancery other than that which is the rule of property at law. 3. It is clear that the legal estate of a term for years, whether it be a long or of short term, cannot be limited to any man in tail, with the remainder over to another after his death without issue; that is flat and plain, for that is a direct perpetuity.[1] 4. If a term be limited to a man and his issue, and if he die without issue the remainder over, the issue of that issue takes no estate; and yet because the remainder over cannot take place [*29] till the issue of that issue fail, that remainder is void too, which was *Reeve's Case*, and the reason is because that looks towards a perpetuity. 5. If a term be limited to a man for life, and after to his first, second, third, &c., and other sons in tail successively, and for default of such issue the remainder over; though the contingency never happen, yet that remainder is void, though there were never a son then born to him, for that looks like a perpetuity; and this was *Sir William Backhurst his Case* [16 Jac. 1, 1 Mod. 115]. 6. Yet one step further than this, and that is *Burgess's Case* [1 Mod. 115]; a term was limited to one for life with contingent remainders to his sons in tail, with remainder over to his daughter, though he had no son; yet because it is foreign

[1] But see such an executory devise in Stanley v. Baker, ante p. 232.

and distant to expect a remainder after the death without issue of a son to be born, that having a prospect of a perpetuity also was adjudged to be void. These things having been settled, and by these rules has this court always governed itself, but one step more there is in this case; 7. If a term be devised or the trust of a term limited to one for life, with twenty remainders for life successively, and all the persons *in esse* and alive at the time of the limitation of their estates; these, though they look like a possibility upon a possibility, are all good, because they produce no inconvenience, they wear out in a little time with an easy interpretation; and so was *Alford's Case.* I will yet go further. 8 In the case cited by Mr. Holt, *Cotton and Heath's Case* [Roll. Abr., Devise, 612 *ante* —], a term is devised to one for 18 years, after to C his son for life, and then to the eldest issue male of C for life; though C had not any issue male at the time of the devise or the death of the devisor, but before the death of C, it was resolved by Mr. Justice Jones, Mr. Justice Croke, and Mr. Justice Berkley, to whom it was referred by the Lord Keeper Coventry, that it only being a contingency upon a life that would be speedily worn out, it was very good; for that there may be a possibility upon a possibility, and that there may be a contingency upon a contingency is neither unnatural nor absurd in itself. But the contrary rule given as a reason by my Lord Popham in the *Rector of Chedington's Case* [1 Coke 156], looks like a reason of art; but in truth, has no kind of reason in it; and I have known that rule often denied in Westminster-hall. In truth every executory devise is so, and you will find that rule not allowed in *Blanford and Blanford* (13 Jac. 1), 1 Rolls Abr. 318; where he says; if that rule take place it will shake several common assurances; and he cites *Paramour and Yardley's Case* in the Commentaries [2 Plowd. Com. 539], where it was adjudged a good devise, though it were a possibility upon a possibility.

[*30] The conclusions which I have thus laid down are but preliminaries to the main debate. It is now fit we should come to speak of the main question in the case, as it stands upon its own reason, distinguished from the reasons of these preliminaries; and so the case is this: The trust of a term for 200 years is limited to Henry in tail, provided if Thomas die without issue in the life of Henry, so that the earldom shall descend upon Henry, then to go to Charles in tail; and whether this be a good limitation to Charles in tail is the question. For most certainly it is a void limitation to Edward in tail, and a void limitation to the other brothers in tail. But whether it be good to Charles is the doubt, who is the first taker of this term in gross. For so it is (I take it) now become, and I do, under favor, differ from my Lord Chief Justice on that point; for if Charles die it will not return to Henry; for that is my Lord Coke's error in *Leonard Lovies's Case,* 10 Coke 78, 87; for he says, that if a term be devised to one and the heirs males of his body, it shall go to him or his executors no longer than he has heirs males of his body; but it was resolved otherwise in

Leventhrop and Ashby's Case (11 Car. I [1635], B. R., Rolls Abr. t. Devise, fol. 611, for these words are not the limitation of the time but the absolute disposition of the term.

But now let us, I say, consider whether this limitation be good to Charles or no. It has been said: 1. It is not good by any means; for it is a possibility upon a possibility. That is a weak reason, and there is nothing of argument in it; for there never was yet any devise of a term with remainder over, but did amount to a possibility upon a possibility, and executory remainders will make it so. 2. Another thing was said: It is void, because it doth not determine the whole estate, and so they compare it to *Sir Anthony Mildmay's Case* [ante p. , 6 Coke 40], where it is laid down as a rule, that every limitation or condition ought to defeat the entire estate, and not to defeat part and leave part not defeated; and it cannot make an estate to cease as to one person, and not as to the other.[1] But I do not think that any case or rule was ever worse applied than that to this; for if you do observe this case, here is no proviso at all annexed to the legal estate of the term, but to the equitable estate that is built upon the legal estate unto the estate to Henry and the heirs males of his body, to attend the inheritance, with a proviso if Thomas die without issue in Henry's life and the earldom come to Henry, then to Charles; which doth determine the estate to Henry and his issue. But the other estate given to Charles doth arise upon this proviso: which makes it an absurdity to say, that the same proviso upon which the estate ariseth should determine that estate too. [*31] 3. The great matter objected is, it is against all the rules of law, and tends to a perpetuity. If it tends to a perpetuity, there needs no more to be said; for the law has so long labored against perpetuities, that it is an undeniable reason against any settlement if it can be found to tend to a perpetuity. Therefore let us examine whether it do so; and let us see what a perpetuity is, and whether any rule of law is broken in this case.

A perpetuity is the settlement of an estate or an interest in tail with such remainders expectant upon it as are in no sort in the power of the tenant in tail in possession to dock by any recovery or assignment, but such remainders must continue as perpetual clogs upon the estate. Such do fight against God; for they pretend to such a stability in human affairs as the nature of them admits not of; and they are against the reason and the policy of the law, and therefore not to be endured. But on the other side, future interests, springing trusts, or trusts executory, remainders that are to emerge and arise upon contingencies, are quite out of the rules and reasons of perpetuities, nay, out of the reason upon which the policy of the law is founded in those cases, especially, if they be not of remote or long consideration, but such as by a natural

[1] As to the rule that a condition cannot operate to determine part only of the estate, but must determine all or none, see further in Colthurst v. Bejushin, ante p. ; Scolastica's Case or Newes v. Lark, ante p.

and easy interpretation will speedily wear out, and so things come to their right channel again.

Let us examine this rule with respect to freehold estates, and see whether there it will amount to the same issue. There is not in the law a clearer rule than this, that there can be no remainders limited after a fee simple; so is the express book, case, 29 Hen. 8, 33, in my Lord Dyer [ante p.] But yet the nature of things, and the necessity of commerce between man and man, have found a way to pass by that rule, and that is thus: either by way of use or by way of devise. Therefore, if a devise be to a man and his heirs, and if he die without issue in the life of B, then to B and his heirs; this is a fee-simple upon a fee-simple, and yet it has been held to be good. My lord chief baron did seem to think that this resolution did take its original from *Pells and Brown's Case* [ante p.]; but it did not so, the law was settled before. You may find it expressly resolved 19 Eliz. in a case between *Hinde and Lyon,* 3 Leonard [64] (which, of the books that have lately come out, is one of the best); and it was there adjudged to be so good a limitation that the heir who pleaded *reins per descent* [nothing by descent] was forced to pay the debt. And it had the concurrance of a judgment in 38 Eliz., grounded upon the reason of *Wellock and Hammond's Case* [*ante* —] cited in *Boraston's Case* [*ante* —] where it is said, Croke Eliz. 204, in a devise it may well be that an estate in fee shall cease in one and be transferred to another. All this was before *Pells and Brown's Case* [ante p.], which was in 18 Jac. [I]. It is true, it was made a question afterwards in the sergeants' case. [*32] But what then? We all know that is no rule to judge by; for what is used to exercise the wits of the sergeants is not a governing opinion to decide the law. It was also adjudged in Hil. 1649, when my Lord Rolls was chief justice, and again in 1650; and after that, indeed, in 1651, it was resolved otherwise in *Jay and Jay's Case* [Stiles 258]. But it has been often agreed that where it is within the compass of one life, that the contingency is to happen, there is no danger of a perpetuity. And I oppose it to that rule which was taken by one of the lords the judges, that where no remainders can be limited no contingent remainders can be limited, which I utterly deny; for there can be no remainder limited after a fee-simple; yet there may a contingent fee-simple arise out of the first fee, as hath been shown.

Thus it is agreed to be by all sides in the case of an inheritance. But now, say they, a lease for years, which is a chattel, will not bear a contingent limitation in regard of the poverty and meanness of a chattel estate. Now as to this point. The difference between a chattel and an inheritance is a difference only in words, but not in substance, nor in reason, or the nature of the thing; for the owner of a lease, has as absolute a power over his lease, as he that hath an inheritance has over that. And therefore where no perpetuity is introduced, nor any inconvenience doth appear, there no rule of law is broken.

The reasons that do support the springing trust of a term, as well as the springing use of an inheritance, are these:

1. Because it hath happened sometimes, and doth frequently, that men have no estates at all but what consist in leases for years. Now it were not only very severe, but (under favor) very absurd, to say that he who has no other estate but what consists in leases for years shall be incapable to provide for the contingencies of his own family, though these are directly within his view and immediate prospect. And yet if that be the rule, so it must be; for I will put the case: A man that hath no other estate but leases for years, chattels real, treats for the marriage of his son, and thereupon it comes to this agreement: these leases shall be settled as a jointure for the wife, and provision for the children. Says he, I am content, but how shall it be done? Why, thus: You shall assign all these terms to John A. Stiles, in trust for yourself and your executors if the marriage take no effect; but then, if it takes effect, to your son while he lives, to his wife after while she lives, with remainders over. I would have anyone tell me whether this were a void limitation upon a marriage settlement, or if it be, what a strange absurdity is it, that a man shall settle it if the marriage take no effect, and shall not settle it if the marriage happen.

2. Suppose the estate had been limited to Henry Howard and the heirs males of his body till the death of Thomas without issue, then to Charles: there it had been a void limitation to Charles. If then the addition of these words: *If Thomas die without issue in the life of Henry,* &c. have not mended the matter, then all that addition [*33] of words goes for nothing, which it is unreasonable and absurd to think it should.

3. Another thing there is, which I take to be unanswerable, and gather it from what fell from my Lord Chief Justice PEMBERTON; and when I can answer that case, I shall be able to answer myself very much for that which I am doing. Suppose the proviso had been thus penned: *and if Thomas die without issue male, living Henry, then the term of 200 years limited to him and his issue shall utterly cease and determine, but then a new term of 200 years shall arise and be limited to the same trustees, for the benefit of Charles in tail.* This he thinks might have been well enough, and attained the end and intention of the family: because then this would not be a remainder in tail upon a tail, but a new term created. Pray let us so resolve causes here, that they may stand with the reason of mankind, when they are debated abroad. Shall that be reason here that is not reason in any part of the world besides? I would fain know the difference, why I may not raise a new springing trust out of the same term, as well as a new springing term out of the same trust. That is such a chicanery of law as will be laughed at all over the Christian world.

4. Another reason I go on is this: That the meanness of the consideration of a term for years, and of a chattel interest, is not to be regarded. For whereas this will be no reason any where else; so I shall

show you, that this reason, as to the remainder of a chattel interest, is a reason that has been exploded out of Westminster-hall. There was a time, indeed, that this reason did so far prevail, that all the judges, in the time of my Lord Chancellor Rich, did, 6 Edward 6, deliver their opinions, that if a term for years be devised to one, provided that if the devisee die living J. S., then to go to J. S.; that remainder to J. S. is absolutely void, because such a chattel interest of a term for years is less than a term for life, and the law will endure no limitation over [1 Dyer 74b, *ante* —]. Now this being a reason against sense and nature, the world was not long governed by it; but in 10 Eliz., in Dyer [fol. 277], they began to hold that the remainder was good by devise; and so 15 Eliz. seems to [Dyer 328], and 19 Eliz. [Dyer 358] it was by the judges held to be a good remainder; and that was the first time that an executory remainder of a term was held to be good. When the chancery did begin to see that the judges of the law did govern themselves by the reason of the thing, this court followed their opinion. The better to fix them in it, they allowed of bills by the remainder man to compel the devisee of the particular estate to put in security that he should enjoy it according to the limitation. And for a great while so the practice stood, as they thought it might well, because of the resolution of the judges, as we have shown; but after this was seen to multiply chancery suits, then they began to resolve that there was no need of that [*34] way, but the executory remainder man should enjoy it, and the devisee of the particular estate should have no power to bar it. Men began to presume upon the judges then, and thought if it were good as to remainders after estates for lives, it would be good also as to remainders upon estates tail. That the judges would not endure; and that is so fixed a resolution, that no court of law or equity ever attempted to break in the world.

Now then we come to this case, and if so be where it does not tend to a perpetuity, a chattel interest will bear a remainder over, upon the same reason it will bear a remainder over upon a contingency, where that contingency doth wear out within the compass of a life; otherwise it is only to say it shall not because it shall not, for there is no more inconvenience in the one than in the other.

Come we then at last to that which seems most to choke the plaintiff's title to this term, and that is the resolution in *Child and Bailie's Case* [*ante, p.*]; for it is upon that judgment it seems all conveyances must stand or be shaken, and our decrees made. Now, therefore, I will take the liberty to see what that case is, and how the opinion of it ought to prevail in our case. 1. If *Child and Bailie's Case* be no more than as it is reported by Rolls, part 2, fol. 119, then it is nothing to the purpose: A devise of a term to Dorothy for life, the remainder to William, and if he die without issue, to Thomas (without saying *in the life of Thomas*); and so it is within the common rule of a limitation of a term in tail with remainder over, which cannot be good. But if it be as Justice Jones has reported it, fol. 15, then it is, as far as it can

go, an authority; for it is there said to be *living Thomas*. But the case (under favor) is not altogether as Mr. Justice Jones hath reported it neither; for I have seen a copy of the record upon this account; and, by the way, no book of law is so ill corrected or so ill printed as that. The true case is as it is reported by Mr. Justice Croke (Cro. Hilary 15, Jac. 459); and with Mr. Justice Croke's report of it doth my Lord Rolls agree in his Abridgment, title Devise 612. There it is a term of 76 years is devised to Dorothy for life, then to William and his assigns all the rest of the term; provided if William die without issue then living, then to Thomas; and this is in effect our present case; I agree it. But that which I have to say of this case is: *First,* It must be observed that the resolution there did go upon several reasons which are not to be found in this case: (1) One reason was touched on, by my Lord Chief Baron, that William having the term to him and his assigns, there could be no remainder over to Thomas, of which words there is no notice taken by Mr. Justice Jones. (2) Dorothy the devisee for life was executrix, and did assent and grant the lease to William, both which reasons my Lord Rolls doth lay hold upon, as material to govern the case. [*35] (3) William might have assigned his interest, and then no remainder could take place, for the term was gone. (4) He might have had issue, and that issue might have assigned, and then it had put all out of doubt. (5) But the main reason of all that makes me oppose it ariseth out of the record, and is not taken notice of in either of the reports of Rolls or Jones or in Rolls's Abridgment. The record of that case goes farther: for the record says there was a farther limitation upon the death of Thomas without issue to go to the daughter, which was a plain affectation of a perpetuity to multiply contingencies. It further appears by the record, that the father's will was made the 10th of Eliz. Dorothy, the devisee for life, held it to the 24th, and then she granted and assigned the term to William; he under the grant held it till the 31st of Eliz., and then re-granted it to his mother and died; the mother held it till the 1st of K. James, and then she died; the assignees of the mother held it till 14 Jac.; and then, and not till then, did Thomas, the younger son, set up a title to that estate; and before that time, it appears by the record, there had been six several alienations of the term to purchasers for a valuable consideration, and the term renewed for a valuable fine paid to the lord. And we do wonder now, that after so long an acquiescence as from 10 Eliz. [1568] to 14 Jac. [1617], and after such successive assignments and transactions, that the judges began to lie hard upon Thomas as to his interest in law in the term, especially when the reasons given in the reports of the case were legal inducements to guide our judgments, of which there are none in our case.

But then, *Secondly,* at last, allowing this case to be as full and direct an authority as is possible, and as they would wish that rely upon it; then I say: (1) The resolution in *Child and Bailie's Case* is a resolution that never had any resolution like it before nor since. (2) It is a

resolution contradicted by some resolutions; and to show that that resolution has been contradicted, there is the case of *Cotton* v. *Heath* (Rolls Abr. t. Devise 612 [*ante* —]), which looks very like a contrary resolution; there is a term limited to A for 18 years, the remainder to B for life, the remainder to the first issue of B for life—this contingent upon a contincase, 21 Car. 2, in July 1669, between *Wood and Saunders* [1 Cases in Ch. gent was allowed to be good because it would wear out in a short time. But to come up more fully and closely to it, and to show you that I am bound up by the resolutions of this court, there was a fuller and flatter 131]. The trust of a long lease is limited and declared thus: to the father for sixty years if he lived so long, then to the mother for sixty years if she lived so long, then to John and his executors if he survived his father and mother, and if he died in their lifetime having issue, then to his issue, but if he die without issue living the father or mother, then the remainder to Edward in tail. [*36] John did die without issue in the lifetime of the father and mother, and the question was, whether Edward should take this remainder after their death; and it was resolved by my Lord Keeper Bridgman, being assisted by Judge Twisden and Judge Rainford, that the remainder to Edward was good; for the whole term had vested in John if he had survived; yet the contingency never happening, and so wearing out in the compass of two lives in being, the remainder over to Edward might well be limited upon it. Thus we see, that the same opinion which Sir Orlando Bridgman held when he was a practicer and drew these conveyances upon which the question now ariseth, remained with him when he was the judge in this court, and kept the seals. And, by the way, I think it is due to the memory of so great a man, whenever we speak of him, to mention him with great reverence and veneration for his learning and integrity.

They will perhaps say: Where will you stop if not at *Child and Bailie's Case?* Where? Why everywhere where there is any inconvenience, any danger of a perpetuity. And wherever you stop at a limitation of a fee upon a fee, there we will stop in the limitation of a term of years. No man ever yet said a devise to a man and his heirs, and if he die without issue living B, then to B, is a naughty remainder; that is *Pells and Brown's Case.* Now the *ultimum quod sit,* or the utmost limitation of a fee upon a fee, is not yet plainly determined; but it will be soon found out if men shall set their wits on work to contrive by contingencies, to do that which the law has so long labored against.

* * *

Therefore my present thoughts are that the trust of this term was well limited to Charles, who ought to have the trust of the whole term decreed to him, and an account of the mean profits for the time past, and a recompense made to him from the duke and Marriot for the time to come. But I do not pay so little reverence to the company I am in, as to run down their solemn arguments and opinions upon my present sentiments; and therefore I do suspend the enrollment of

any decree in this case as yet. But I will give myself some time to consider before I take any final resolution, seeing the lords, the judges, do differ from me in their opinions.

[On the day appointed by the chancellor for final judgment May 13th, 1682, counsel for the Duke of Norfolk begged permission to be heard further, and by grace of the chancellor, the case was continued from time to time till June 17th, 1682, at which time it was argued at some length, and then the following opinion and decree given by the lord chancellor.]

Lord Chancellor Nottingham. I am not sorry for the liberty that was taken at the bar to argue this over again, because I desired it should be so; for in truth I am not in love with my own opinion. * * * It will be good for the satisfaction of the public in this case, to take notice how far the court is agreed in this case, and then see where they differ, and upon what grounds they differ, and whether anything that hath been said be a ground for the changing this opinion. The court is agreed thus far: [*48] That in this case it is all one, the limitation of the trust of a term, or the limitation of the estate of a term, all depends upon one and the same reason. The court is likewise agreed (which I should have said first, to dispatch it out of the case, that it may not trouble the case at all) that the surrender of Marriot to the Duke of Norfolk, and the common recovery suffered by the duke, are of no use at all in this case. For if this limitation to Charles be good, then is this surrender and the recovery a breach of trust, and ought to be set aside in equity; so all the judges that assisted at the hearing of this cause agreed. If the limitation be not good, then there was no need at all of a surrender to bar it, nor of the common recovery to extinguish it. But then we come to consider the limitation, and there it [is] agreed all along in point of law, that the measures of the limitations of the trust of a term and the measures of the limitations of the estate of a term, are all one and uniform, here and in other cases, and there is no difference at chancery and at common law, between the rules of the one and the rules of the other. What is good in one case is good in the other. And therefore in this case the court is agreed too, that the limitations made in this settlement to Edward, &c., are all void; for they tend directly and plainly to perpetuities, for they are limitations of remainders of a term in gross after an estate-tail in a term, which commenceth to be a term in gross when the contingency for Charles happens.

Thus far there is no difference of opinion; but whether the limitation to Charles if Thomas die without issue living Henry, whereby the honor of the earldom of Arundel descends upon Henry—I say, whether that be void too is the great question of this case, wherein we differ in our opinions.

It is said that is void too. And yet (sever it from the authority of *Child and Bailie's Case,* which I will speak to by and by) I would be

glad to see some tolerable reason given why it should be so; for I agree it is a question in law upon a trust, as it would be elsewhere upon an estate; and so the questions here are both questions of law and equity. It was well said, and well allowed by all the judges, when they did allow the remainders of terms after estates-tail in these terms to be void. I shall not devise a term to a man in tail with remainders over. The judges have admirably well resolved in it; and the law is settled; and *Matthew Manning's Case* [*ante* p.] did not stretch so far, because this would tend to a perpetuity. Now, on the other side, I should fain know, when there is a case before the court, where the limitation doth not tend to a perpetuity, nor introduceth any visible inconvenience, what should hinder that from being good. For though if there be a tendency to a perpetuity, or a visible inconvenience, that shall be void for that reason; yet the bare limitation of the remainder after an estate-tail which doth not tend to a perpetuity, that is not void. Why? Because it is not? I dare not say so. See then the reasons why it is so.

[*49] The reasons that I lie under the load of, and cannot shake off, are these: The law doth in many cases allow of a future contingent estate to be limited, where it will not allow a present remainder to be limited; and that rule, well understood, goeth through the whole case. How do you make that out? Thus: If a man have an estate limited to him his heirs and assigns for ever (which is a fee-simple), but if he die without issue, living J. S., or in such a short time, then to J. D., though it be impossible to limit a remainder of a fee upon a fee, yet it is not impossible to limit a contingent fee upon a fee. And they that speak against this rule, do endeavor as much as they can to set aside the resolutions of *Pells and Brown's Case* [*ante* p.], which (under favor) was not the first case that was resolved; for, as I said before, when I first delivered my opinion, it was resolved to be a good limitation, 19 Eliz., in the case of *Hinde and Lyon,* 3 Leonard 64; which, by the way, is the best book of reports of the later ones that hath come out without authority. If that be so, then where a present remainder will not be allowed a contingent one will. If a lease for years come to be limited in tail, the law allows not a present remainder to be limited thereupon, yet it will allow a future estate arising upon a contingency only, and that to wear out in a short time. But what time, and where are the bounds of that contingency? You may limit, it seems, upon a contingency to happen in a life. What if it be limited, if such a one die without issue within 21 years, or 100 years, or while Westminster-hall stands? Where will you stop if you do not stop here? I will tell you where I will stop. I will stop wherever any visible inconvenience doth appear; for the just bounds of a fee-simple upon a fee-simple are not yet determined; but the first inconvenience that ariseth upon it will regulate that.

First of all then, I would fain have anyone answer me, where there is no inconvenience in this settlement, no tendency to a perpetuity in this limitation, and no rule of law broken by the conveyance, what

should make this void? And no man can say that it doth break any rule of law, unless there be a tendency to a perpetuity, or a palpable inconvenience. Oh, yes, terms are mere chattels, and are not in consideration of law so great as freeholds or inheritances. These are words, and but words; there is not any real difference at all, but the reason of mankind will laugh at it. Shall not a man have as much power over his lease as he has over his inheritance? If he have not, he shall be disabled to provide for the contingencies of his own family that are within his view and prospect, because it is but a lease for years and not an inheritance or a freehold. There is that absurdity in it which is to me insuperable; nor is the case that was put, answered in any degree. * * * [*50] * * *

But I expect to hear it said from the bar, and it has been said often: The case of *Child and Bailie* is a great authority. So it is. But this I have to say to it: First, the point resolved in *Child and Bailie's Case* was never so resolved before, nor ever was such a resolution since. *Pells and Brown's Case* was otherwise resolved, and has often been adjudged so since. In the next place, I will not take much pains to distinguish *Child and Bailie's Case* from this, though the word *assigns* and the grant of the remainder by the mother who was executrix, are things which Rolls lays hold on as reasons for the judgment. But I know not why I may not, with reverence to the authority of that case and the learning of those that adjudged it, take the same liberty as the judges in Westminster-hall sometimes do, to deny a case that stands single and alone of itself. And I am of opinion the resolution in that case is not law, though there it came to be resolved upon very strange circumstances to support such a resolution; for the remainder of a term of 76 years is called in question when but 15 years of it remained, and after possession had shifted hands several times, and therefore I do not wonder that the consideration of equity swayed that case. But I put it upon this point, pray consider, there is nothing in *Child and Bailie's Case* that doth tend to a perpetuity, nor anything in the settlement of the estate there, that could be called an inconvenience, not any rule of law broken by the conveyance; but it is absolutely a resolution *quia volumus;* for it disagrees with all the other cases before and since, all which have been otherwise resolved. [*51] But it is a resolution, I say, merely because it is a resolution. And it is expressly contrary to *Wood and Sanders's Case* [1 Ch. Cas. 131], which no art or reason can distinguish from our case or that. For here is that case which was clipped and minced at the bar, but never answered. *Wood and Sander's Case* is this: to the husband for 60 years if he lived so long, to the wife for 60 years if she lived so long, then if John be living at the time of the death of the father and mother, then to John, but if he die without issue living father or mother, then to Edward. Suppose these words *living father or mother* had been out of the case, and it had been to John, and if he die without issue, then to Edward. will any man doubt but then the remainder over had been void, because it

is a limitation after an express entail? How came it then to be adjudged good? Because it was a remainder upon a contingency that was to happen during two lives, which was but a short contingency, and the law might very well expect the happening of it. Now that is this case, nay ours is much stronger; for here it is only during one life, there were two. The case of *Cotton and Heath* [Rolls Abr. t. Devise 612] in Rolls comes up to this: A term is devised to A for 18 years, the remainder to B for life, the remainder to the first issue male of B; which is a contingent estate after a contingency, and yet it was adjudged good, because the happening of the contingency was to be expected in so short a time. Now that case was adjudged by my Lord Keeper Coventry, Mr. Justice Jones, Mr. Justice Croke, and Mr. Justice Berkley, as *Wood and Sanders's Case* was by my Lord Keeper Bridgman, Mr. Justice Twisden, and Mr. Justice Reinford. So that however I may seem to be single in my opinion, having the misfortune to differ from the three learned judges who assisted me, yet I take myself to be supported by seven opinions in these two cases I have cited.

If then this be so, that here is a conveyance made which breaks no rules of law, introduces no visible inconvenience, savors not of a perpetuity, tends to no ill example, why this should be void, only because it is a lease for years, there is no sense in that.

Now if Charles Howard's estate be good in law it is ten times better in equity. For it is worth the considering, that this limitation upon this contingency happening (as it hath, God be thanked), was the considerate desire of the family, the circumstances whereof required consideration, and this settlement was the result of it, made with the best advice they could procure, and is as prudent a provision as could be made. For the son now to tell his father that the provision that he had made for his younger brother is void, is hard in any case at law; but it is much harder in chancery; for there no conveyance is ever to be set aside where it can be supported by a reasonable construction, and here must be an unreasonable one to overthrow it. [*52] I take it then to be good both in law and equity; and if I could alter my opinion, I would not be ashamed to retract it; for I am as other men are, and have my partialities as other men have. When all this is done, I am at the bar desired to consider further of this case. I would do so if I could justify it; but expedition is as much the right of the subject as justice is, and I am bound by *Magna Charta, nulli negari, nulli differre justitiam.* I have taken as much pains and time as I could to be informed. I cannot help it if wiser men than I be of another opinion; but every man must be saved by his own faith, and, I must discharge my own conscience. * * * I must decree for the plaintiff in this case, and my decree is this: That the plaintiff shall enjoy this barony for the residue of the term of 200 years; the defendant shall make him a conveyance accordingly, because he extinguished the trust in the other and the term, contrary to both law and reason, by the merger and surrender and common recovery; and that the defendants do account

with the plaintiff for the profits of the premises by them or any of them received since the death of the said Duke Thomas, and which they or any of them might have received without wilful default; and that it be referred to Sir Lacon William Child, Knight, one of the masters of this court, to take the said account. * * *

[This decree was reversed in the high court of chancery May 15, 1683 by Lord Keeper North, on bill for review filed by defendants herein; and that decree of the high court of chancery was reversed and the above decree of Lord Chancellor NOTTINGHAM affirmed by the House of Lords, June 19th, 1685, on appeal by Charles Howard.]

SCATTERWOOD v. EDGE, in Common Pleas, Trinity term, 9 Wm. III, A. D. 1699—1 Salk. 229.

In ejectment a special verdict was found, viz.: Robert Edge devised to trustees for eleven years, and then *to the first son of A and the heirs of his body, and so on to the second, third, &c., sons in tail male, provided they the said sons shall take on them my surname; and in case they or their heirs refuse to take my surname, or die without issue, then I devise my land to the first son of B in tail male, provided he take my surname;* and if he refuse or die without issue, then to the right heirs of the devisor. A had no son at the time of the devise, and died without issue; and B had a son who was living at the time of the devise, who took the surname of the devisor.

The whole court agreed: 1. That the devise to the first son of A was not a contingent remainder, but by way of executory devise, because the precedent estate is for years, which cannot support a remainder; for a contingent remainder can never depend on a term of years, because of the abeyance of the freehold; nor can it be limited after a fee, because after such a disposal nothing remains in the owner to limit. *Et per* POWELL, a devise to the first son of A, having none at that time, is void, because it is by way of a present devise, and the devisee is not *in esse;* but a devise to the first son of A, when he have one is good, for that is only a future devise, and no inconvenience, for the inheritance descends in the meantime. 2. They held that an executory estate, to arise within the compass of a reasonable time, is good; that 20, nay 30 years, has been thought a reasonable time. So is the compass of a life or lives; for let the lives be never so many, there must be a survivor, and so it is but the length of that life (for Twisden used to say the candles are all lighted at once); but they were not for going one step farther, because these limitations make estates unalienable, every executory devise being a perpetuity as far as it goes, that is to say, an estate unalienable though all mankind join in the conveyance. And as to the principal case BLENCOW, J., held the devise to the first son of A to be future; for he supposed the testator knew A had no son, and that the rather because he does not name him. POWELL, J.: There are three sorts of executory estates: One where the devisor parts with his whole fee-simple, but upon some contingency qualifies that disposition, and

limits another fee upon that contingency; which is altogether new, as appears by 1 Inst. 18 a fee cannot be limited upon a fee. Vide 1 Ro. 825, 826; 1 Cro., *Pells* v. *Brown.* The second sort is where he gives a future estate to arise upon a contingency, and does not part with the fee at present, but retains it; these are not against law, for by common law one might devise that his executor should sell his land, and in such case the vendee is in by the will, and the fee descends to the heir in the meantime. For this sort, *vide*: 2 Leon. 11; 3 Leon. 64; Cro. Eliz. 833; Moor 644; 2 Rolle 793; Raym. 82. A third sort of executory devises is of terms, which are well settled in *Matthew Manning's Case.* It is dangerous to extend the boundary of these executory devises, which at present is a life or lives. A devise to an infant *in ventre sa mere,* by the better opinions, though various, is not good: *Vide:* 11 Hen. VI, 13; Brooke [Abr.] Devises 32; 1 Rolle 609, 610; Dyer 303, 304, 342; Moor 127, 177, 634; 2 Bulst. 272; 1 Rolle Rep. 110; Litt. 255. But I am of opinion that it is good, for he taking notice that the devisee is *in ventre,* must intend a future devise; but a devise to A's first son does not import notice in the devisor that A has no son; it may as well be said a devise to the heirs of J. S., a person living, is good, because the testator knew he was alive, and therefore meant a future devise. The question here is whether the precedent term for eleven years makes a difference. I hold not, because it is an original devise *per verba de presenti,* and so differs from 1 Raym. 12; 2 Mod. 292. But had it been to the first son to be begotten it had been otherwise. Lastly he held that the devise to the first son of B, who was born and *in esse* at the time, was good; and as to the objection that the devise to the first son of A was a condition precedent, and so, that failing, all fails (*Vide* 1 Inst. 218), he held it was not a precedent condition, but part of the limitation. TREBY, C. J.: If the devise to the first son of A be good, then the devise to the first son of B is not good; but if that to the first son of A be bad, then this to the first son of B is good. Had the first son of A been before the court, the judgment must have been against him, because as a remainder it was void, and as an executory devise it was void; for these are either present or future: If present, the party must be *in esse & capax* at the time, or all is void—like a devise to the right heirs of J. S., who is living, this is a present devise and therefore not like the case of an infant *in ventre sa mere;* where future, they must arise within the compass of a life, no longer time has yet been allowed, and he was not for prolonging the time in favor of these inconvenient estates. 2. He held the devise to the first son of A was not a precedent condition, but a precedent estate attended with these limitations. Judgment was given for the defendant and afterwards affirmed by the king's bench.

GORE v. GORE, in Chancery, referred to the judges of the King's Bench, in 1722 and 1733—2 P. Wms. 28, 2 Strange 958, 10 Mod. 501, 2 Kel. 254, 2 Barnard K. B. 209, 229, 355, 5 Gray's P. C. 166. Abridged from P. Wms. and Strange.

This case came on before Lord Chancellor Macclesfield, who referred it to the judges of the king's bench for their opinion. William Gore, being seised in fee, devised to trustees and their heirs to the use of the trustees for 500 years, to raise younger childrens' fortunes and pay debts, and after the determination of that estate, then to the first and every other son of Thomas Gore (devisor's eldest son), in tail male, remainder to Edward Gore (devisor's second son) in tail male, remainders over. At the death of the devisor, Thomas was a bachelor, but afterwards married and had a son; and upon this two questions arose: 1, whether this son of Thomas could take; and, 2, in whom the freehold vested at the death of the devisor.

The judges certified their opinion as follows: "We have heard counsel on both sides on the question above specified, and having considered the same, are of opinion, that the devise of the manors above mentioned to the first son of Thomas Gore is void, because he cannot take by way of remainder, for that there is no freehold to support it; nor can he take by way of executory devise, because it is not to take place within that compass of time which the law allows: and we are also of opinion, that the freehold of the same manors, on the death of the devisor, were vested in Edward, the second son. JOHN PRATT [C. J.], LITTLETON POWLS, R. EYER, J. FORTESQUE ALAND [JJ.]—1722."

LORD MACCLESFIELD expressed some dissatisfaction with the opinion of the judges, saying that though the law might be so, yet the term of 500 years being but a trust term, and so to be considered in equity as a security only for money, was not to be so regarded, at least in equity, as to make the devise over void. After which the son of Thomas came to agreement with his uncle Edward, which was confirmed by the court.

Afterwards Thomas had a second son, and died, and this second son brought the matter up again in the chancery; and LORD KING, now being Lord Chancellor, sent it a second time to the court of king's bench, and the justices this time certified against the opinion of their predecessors, as follows: "Upon hearing counsel on both sides, and consideration of this case, we are of opinion, that the devise of the manors of Barrow and Southley to the first son of Thomas Gore is good by way of executory devise, and that the freehold of the said manors, on the death of the devisor, vested in his heir at law. HARDWICKE [C. J.], F. PAGE, E. PROBYN, W. LEE [JJ.], Jan. 26, 1733."

This being certified, the cause was set down before LORD TALBOT, after Trinity term, 1734, who declared his agreement in opinion with the last certificate, and made his decree accordingly. LORD RAYMOND was also of the same opinion.

LONG v. BLACKALL, in King's Bench, Hilary term, 37 Geo. III, A. D. 1797—7 Term 100.

A case was sent from the court of chancery to this court for the opinion of the judges, stated that George Blackall made his will April 23, 1709, and died June 1, 1709, leaving two sons, Thomas and George, and his wife Martha surviving; and she was then enceinte with a son afterwards born and named John. By his will he devised his mansion house to his widow till her death or marriage or till a son of his should attain 21; then to Thomas for life and on his death to his male issue then living, who should be his heir, if any; if none, then to George for life, and on his death to his male issue then living, who should be his heir, if any; if none, then to the child, if a son, with which the wife was then enceinte for life, and on his death to his male issue then living, if any; and if such child should leave no male issue him surviving, or should not be a son, then to Philippa Long, &c. The son George died without issue April 14, 1753; John died without issue March 5, 1754; the widow died Sept. 16, 1768; and Thomas died without issue March 2, 1786. The question submitted for the opinion of the court was whether the limitation to Philippa Long were good in the events that have happened. *Chambre* contended for the plaintiff that the ultimate limitation to her was not too remote; and the only difference between this and the common case is that the period of gestation occurs at the beginning instead of at the end of the first estate for life; but that cannot vary the question as far as it respects the tendency of such limitation to create a perpetuity. *Wood* was proceeding to argue for the defendants; but the court expressed themselves so clearly satisfied that the ultimate limitation to the plaintiff was good, that he declined arguing the point; saying that he had no reason, from the view he had taken of the subject, to expect that he should be able to alter their opinion.

LORD KENYON, C. J. The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations, and the courts have said that the estate shall not be unalienable by executory devises for a longer term than is allowed by limitations of a common law conveyance. In marriage settlements the estate may be limited to the first and other sons of the marriage in tail, and until the person to whom the last remainder is limited is of age the estate is unalienable. In conformity to that rule the courts have said, so far we will allow executory devises to be good. To support this position I could refer to many decisions; but it is sufficient to refer to the *Duke of Norfolk's Case,* in which all the learning on this head was gone into; and from that time to the present, every judge has acquiesced in that decision. It is an established rule that an executory devise is good if it must necessarily happen within a life or lives in being and twenty-one years, and the fraction of another year, allowing for the time of gestation.

[*103] LAWRENCE, J. The devise over in this case must take effect if at all after a life which must be in being within nine months after the devisor's death.

THELLUSSON v. WOODFORD, in the House of Lords, 1805.—1 Bos. & Pul. N. R. 357, 11 Ves. 212, Cruise Dig. tit. Devise 524, 5 Gray's P. C. 530.

This is an appeal to the House of Lords by the complainants in a bill in chancery, and seeking a reversal of the decree (reported in 4 Ves. Jr. 227) of the chancellor dismissing the bill. Decree affirmed.

The complainants are the sons, widow, daughters, and husbands of the daughters of Peter Thellusson; and the defendants are the trustees under his will; and the bill seeks a construction of the will and an adjudication that the trusts are in violation of the rule against perpetuities, and therefore void. The testator being seised of vast estates, real and personal, and having three sons (Peter, George, and Charles) a wife, and several daughters, made his will, dated April 2, 1796; by which he gave to each of his children, besides small annuities, sufficient to make the portion for each son £23,000, and each daughter £12,000, previous advances being reckoned as part of such portions; gave £22,000 of bank stock and £600 per annum long annuities, to his children, subject to a life interest to his wife; and gave all the residue of his estate real and personal to the defendants herein, the survivors and survivor of them and the heirs of the survivor, in trust to permit his wife to use and occupy the capital mansion and grounds and the furniture, horses, books, &c., thereon during widowhood; he then directed that on the death or marriage of the widow the trustees should sell such premises and property and that the proceeds should be considered a portion of the residue of his personal estate. The residue of his personal estate he gave to the same trustees in trust to invest the same in freehold estates in fee in England, and that the rents and profits of the other lands owned by him and the lands so directed to be purchased should be regularly collected by such trustees and accumulated and invested until the death of the last of the children and grandchildren of the testator in being at his death or born in due time afterwards; and he directed his trustees, on the death of such survivor, to divide the residue of the estate real and personal and the accumulations into three lots of equal value, and give the first choice of the three to the then eldest surviving male issue of the testator's son Peter, in tail, with divers remainders over; the second choice in like manner to the eldest male descendant of testator's son George then surviving, in tail, with like remainders over; the remaining lot to the eldest male descendant of testator's son Charles then surviving, in tail, with remainders over; with remainders over as to all the lots to the king or queen of England on failure of issue of such sons.

The property subject to the trust consisted of land in England of the annual value of £4,500, and of land in the West Indies and personal property estimated at above £600,000 value.

The trustees filed a cross-bill praying that the trusts be established and carried into execution. Both the original and cross-bills coming on before Lord Loughborough, assisted by Richard P. Arden (master

of the rolls), Buller and Lawrence, JJ., at Lincoln's Inn Hall, Dec. 5th, 1798, were heard on that and several subsequent days. On Feb. 19th, 1802, the chancellor pronounced his decree dismissing the original bill and establishing the trusts as prayed in the cross-bill. On appeal to the House of Lords, the case was argued at the bar of the house on several days by Mansfield and Romilly for the appellants, and by Att. Gen. Percival, Sol. Gen. Sutton, and Pigott, Richards, Alexander, and Cox, for the respondents. After the argument the following questions were submitted to the judges on motion of Lord Chancellor Elden:

1. A testator by his will, being seised in fee of the real estate therein mentioned, made the following devise:—I give and devise all my manors, messuages, tenements, and hereditaments, at Brodsworth in the county of York, after the death of my sons, Peter Isaac Thellusson, George Woodford Thellusson, and Charles Thellusson, and of my grandson John Thellusson, son of my son Peter Isaac Thellusson, and of such other sons as my son Peter Isaac Thellusson may have, and of such sons as my said sons George Woodford Thellusson and Charles Thellusson may have, and of such issue as such sons may have, as shall be living at the time of my decease, or born in due time afterwards, and after the deaths of the survivors and survivor of the several persons aforesaid, to such person as, at the time of the death of the survivor of the said several persons, shall then be the eldest male lineal descendant of my son Peter Isaac Thellusson and his heirs forever.—At the time of the testator's death, there were seven persons actually born answering the description mentioned in the testator's will, and there were two *in ventre sa mere* answering the description, if children *in ventre sa mere* do answer that description; all the said several persons, so described in the testator's will, being dead, and, at the death of the survivor of such several persons, there being living one male lineal descendant of the testator's son Peter Isaac Thellusson, and one only; Is such person entitled by law, under the legal effect of the devise above stated, and the legal construction of the several words in which the same is expressed, to the said manors, messuages, tenements, and hereditaments at Brodsworth?

2. If at the death of the survivor of such several persons as aforesaid, such only male lineal descendant was not actually born, but was *in ventre sa mere.* Would such lineal descendant when actually born be so entitled?

The unanimous opinion of the judges was pronounced as follows by

[*385] Lord MacDonald, C. B. The first objection to the will is, that the testator has exceeded that portion of time within which the contingency must happen, upon which an executory devise is permitted to be limited by the rules of law, for three reasons. *First,* because so great a number of lives cannot be taken as in the present instance to protract the time during which the vesting is suspended, and consequently the power of alienation suspended. *Secondly,* that the testator has added to the lives

of persons who should be born at the time of his death the lives of persons who might not be born. *Thirdly,* that, after enumerating different classes of lives during the continuance of which the vesting is suspended, the testator has concluded with these restrictive words, "as shall be living at my decease, or born in due time afterwards," and that as these words appertain only to the last class in the enumeration, the words which are used in the preceding classes being unrestricted, they will extend to grandchildren and great-grand children, and their issue, and so make this executory devise void in its creation, as being too remote.

With respect to the first ground, viz. the number of lives taken, which in the present instance is nine, I apprehend that no case or *dictum* has drawn any line as to this point, which a testator is forbidden to pass. On the contrary, in the cases in which this subject has been considered by the ablest judges, they have for a great length of time expressed themselves as to the number of lives, not merely without any qualification or circumscription, but have treated the number of co-existing lives as matter of no moment; the ground of that opinion being, that no public inconvenience can arise from a suspension of the vesting, and thereby placing land out of circulation during any one life, and that in fact the life of the survivor of many persons named or described is but the life of some one. This was held without dissent by Twisden, J., in *Love* v. *Wyndham,* 1 Mod. 50, twenty years before the determination [*386] of the *Duke of Norfolk's case,* who says that the devise of a farm may be for twenty lives, one after another, if all be in existence at once. By this expression, he must be understood to mean any number of lives, the extinction of which could be proved without difficulty. When this subject of executory trusts came to be examined by the great powers of Lord Nottingham as to the time within which the contingency must happen, he thus expresses himself: "If a term be devised, or the trust of a term limited, to one for life with twenty remainders for life, successively, and all the persons are in existence and alive at the time of the limitation of their estates, these, though they look like a possibility upon a possibility, are all good, because they produce no inconvenience; they wear out in a little time." With an easy interpretation, we find from Lord Nottingham what that tendency to a perpetuity is, which the policy of the law has considered as a public inconvenience, namely, where an executory devise would have the effect of making lands unalienable beyond the time which is allowed in legal limitations, that is, beyond the time at which one in remainder would attain his age of twenty-one, if he were not born when the limitations were executed. When he declares that he will stop where he finds an inconvenience, he cannot consistently with sound construction of the context, be understood to mean, where judges arbitrarily imagine they perceive an inconvenience, for he has himself stated where inconvenience begins, namely, by an attempt to supersede the vesting longer than can be done by legal limitations. I understand him to mean, that wherever courts perceive that

such would be the effect, whatever may be the mode attempted, that effect must be prevented; and he gives the same but no greater latitude to executory devises and executory trusts as to estates tail. This has been ever since adopted. In *Scatterwood* v. *Edge,* 1 Salk 229, [*ante* p.] the court held, that an [*387] executory estate, to arise within the compass of a reasonable time is good as twenty or thirty years so is the compass of a life or lives, for let the lives be never so many, there must be a survivor, and so it is but the length of that life. In *Humberston* v. *Humberston,* 1 P. Wms. 332 [ante p.] where an attempt was made to create a vast number of estates for life in succession, as well to persons unborn as to persons in existence, Lord Cowper restrained that devise within the limits assigned to common law conveyances, by giving estates for life to all those who were living (at the death of the testator,) and estates to those who were unborn considering all the co-existing lives (a vast many in number) as amounting in the end to no more than one life. His lordship was in the situation alluded to by Lord Nottingham, where a visible inconvenience appeared. The bounds prescribed to limitations in common law conveyances were exceeded, the excess was cut off, and the devise confirmed within those limits. Lord Hardwicke repeats the same doctrine in *Sheffield* v. *Lord Orrery,* 3 Atk. 282, using the words life or lives without any restriction as to number. Many other cases might be cited to the like effect, but I shall only add what is laid down in two very modern cases. In *Gurnall* v. *Wood,* Willes, 211 Lord Chief Justice Willes speaks of a life or lives without any qualification; and Lord Thurlow, in *Robinson* v. *Hardcastle,* 2 Brown Ch. Cas. 30, says that a man may appoint 100 or 1000 trustees, and that the survivor of them shall appoint a life estate. It appears then, that the coexisting lives, at the expiration of which the contingency must happen, are not confined to any definite number. But it is asked shall lands be rendered unalienable during the lives of all the individuals, who compose very large societies or bodies of men, or where other very extensive descriptions are made use of? It may be answered that when such cases occur, they will, according to their respective circumstances, [*388] be put to the usual test, whether they will or will not tend to a perpetuity, by rendering it almost, if not quite, impracticable to ascertain the extinction of the lives described, and will be supported or avoided accordingly.

But it is contended, that in these and other cases the persons, during whose lives the suspension was to continue, were persons immediately connected with or immediately leading to, the person in whom the property was first to vest when the suspension should be at an end. I am unable to find any authority for considering this as a *sine qua non* in the creation of a good executory trust. It is true that this will almost always be the case and mode of disposing of property, introduced and encouraged up to a certain extent, for the convenience of families, which in almost all instances look at the existing members of the family of the

testator and its connections. But when the true reason for circumscribing the period, during which alienation may be suspended, is adverted to, there seems to be no ground or principle that renders such an ingredient necessary. The principle is, the avoiding of a public evil by placing property for too great a length of time out of commerce. The length of time will not be greater or less, whether the lives taken have any interest, vested or contingent, or have not; nor, whether the lives are those of persons immediately connected with or immediately leading to that person in whom the property is first to vest, terms to which it is difficult to annex any precise meaning. The policy of the law can no way be affected by those circumstances, which I apprehend looks merely to duration of time. This could not be the opinion of Lord Thurlow in *Robinson* v. *Hardcastle,* nor is any such opinion to be found in any case or book upon this subject. The result of all the cases upon this point is thus summed up by Lord Chief Justice Willes (Willes 215) with his usual accuracy and perspicuity: "Executory devises have not been considered as mere possibilities, but as certain interests and estates, and have been resembled to contingent remainders [*389] in all other respects; only they have been put under some restraints to prevent perpetuities. As at first it was held that the contingency must happen within the compass of a life, or lives in being, or a reasonable number of years; at length it was extended a little further, namely, to a child *in ventre sa mere* at the time of the father's death; because, as that contingency must necessarily happen within less than nine months after the death of a person in being, that construction would introduce no inconvenience, and the rule has in many instances been extended to 21 years after the death of a person in being, as in that case likewise there is no danger of a perpetuity." Comparing what the testator has done in the present case with what is above cited, it will appear that he has not postponed the vesting even so long as he might have done.

The second objection which has been made in this case is, that the testator has added to the lives of persons in being at the time of his decease, those of persons not then born. It becomes, therefore, necessary to discover in what sense the testator meant to use the words "born in due time afterwards." Such words, in the case of a man's own children, mean the time of gestation; what is to be intended by these words in this will must be collected from the will itself. It may be collected from the will itself, that by those words the testator meant to describe the period of time within which issue might be born during whose lives the trust might legally continue, or, in other words, whom the law would consider as born at the time of his decease. Now these could only be such children of the several persons named as their respective mothers were *enceinte* with at the time of his death; or, he may have meant to use the words, "due" as denoting that period of time which would be the necessary period for effecting his purpose. This is probable from his using the same word, as ap-

plied to the time during which the presentation to the advowson of Marr might be suspended [*390] without incurring a lapse. That a child *in ventre sa mere* was considered as in existence, so as to be capable of taking by executory devise, was maintained by Powell, J., in the case of *Loddington* v. *Kime,* 1 Ld. Raym. 207 [*ante* —], upon this ground, that the space of time between the death of the father and birth of the posthumous son was so short that no inconvenience could ensue. So in *Northy* v. *Strange,* 1 P. Wms. 340, Sir J. Trevor held, that by a devise to children and grandchildren an unborn grandchild should take. Two years after Lord Macclesfield in *Burdett* v. *Hopegood,* 1 P. Wms. 486. held that where a devise was to a cousin, if the testator should leave no son at the time of his death, a posthumous son should take as being left at the testator's death. In *Wallis* v. *Hodgson,* 2 Atk. 117, Lord Hardwicke held that a posthumous child was entitled under the statute of distributions and his reason deserves notice. "The principal reason (says he) that I go upon is, that the plaintiff was *in ventre sa mere* at the time of her brother's death, and consequently a person *in rerum natura;* so that by the rules of the common and civil law she was, to all intents and purposes, a child as much as if born in the father's lifetime." Such a child, in charging for the portions of other children living at the death of the father, is included as then living, *Beal* v. *Beal,* 1 P. Wms. 244, and so in a variety of other reports. In *Bassett* v. *Bassett,* 3 Atk. 203. Lord Hardwicke decreed rents and profits which had accrued at a rent-day preceding his birth to a posthumous child, and since the stat. of 10 & 11 W. 3, c. 16, such children seem to be considered in all cases of devise, and marriage or other settlement, to be living at the death of their father, although not born till after his decease. It is otherwise considered in the case of descent. In *Roe* v. *Quarterly,* 1 Term 630, the devise was to Hester Read for life (daughter of Walter Read) and to the heirs of her body; and for default of such issue, to such child as the wife of Walter Read is now [*391] *enceinte* with, and the heirs of the body of such child, then to the right heirs of Walter Read and Mary his wife. It was contended that the last limitation was too remote, as coming after a devise to one not in being, and his issue. But the court said, that since the stat. of King William, which puts posthumous children on the same footing with children born in the life-time of their ancestor, this objection seemed to be removed, whatever was the case before. In *Gulliver* v. *Wickett,* 1 Wils. 105, the devise was to the wife for life, then to the child, with which she was supposed to be *enceinte,* in fee, provided that if such child should die before 21 leaving no issue, the reversion should go to other persons named. The court said, if there had been no devise to the wife for life, which made the ulterior estate a contingent remainder, the devise to the child *in ventre sa mere* being *in futuro,* would have been a good executory devise. In *Doe* v. *Lancashire,* 5 Term 49, the court of king's bench has held that

marriage and the birth of a posthumous child revoke a will, in like manner as if the child had been born in the lifetime of the father. In *Doe* v. *Clarke,* 2 H. Bl. 399, Ld. Chief Justice Eyre holds, that independent of intention an infant *in ventre sa mere,* by the course and order of nature, is then living, and comes clearly within the description of children living at the parent's decease; and he professes not to accede to the distinction between the cases in which a provision has been made for children generally, and where the testator has been supposed to mark a personal affection for children who happened to have been actually born at the time of his death. The most recent case is that of *Long* v. *Blackall;* there the court of king's bench had no doubt that a devise to a child *in ventre sa mere* in the first instance was good, and a limitation over was good also, on the contingency of there being no issue male, or descendant of issue male, living at the death of such posthumous child. It seems then, that if estates [*392] for life had been given to the several *cestuis qui vie* in this will, and after their deaths to their children, either born or *in ventre sa mere* at the testator's death, they would have been good. No tendency to perpetuity then can arise in the case of such lives being taken, not to confer on them a measure of the beneficial interest, but to fix the time during which the vesting of the property which is the subject of this devise, shall be protracted; inasmuch as the circulation of real property is no more fettered in the one case than in the other. It is, however, observable that this question may never arise, if it shall so happen that the children *in ventre matris* at the death of the testator shall not survive those who were then born.

The third ground of objection depends upon the application of the restrictive words which are added to the enumeration of the different classes of persons during whose lives the restriction is suspended. This objection I conceive will be removed by the application of the usual rules in construing wills, to the present case. First, where the intention of the testator is clear, and is consistent with the rules of law, that shall prevail. His intention evidently was to prevent alienation as long as by law he could; if then it is to be supposed that the restrictive words are to be confined to the last of seven different descriptions of persons, and that the testator intended to leave the four descriptions of persons which immediately preceded this 7th class, without the benefit of such restriction, although they equally stand in need of it, we must do the utmost violence to all established rules on this head. That construction is to be adopted which will support the general intent. The grammatical rule of referring qualifying words to the last of the several antecedents, is not even supposed by grammarians themselves to apply when the general intent of a writer or speaker would be defeated by such a confined application of them. Reason and common sense revolt at the idea [*393] of overlooking the plain intent which is disclosed in the context, namely, that they should be applicable to such classes as require them, and as to the

others to consider them as surplusage; if words admit of more constructions than one, that which will support the legal intention of the testator is in all cases to be adopted. I do not trouble your lordships with any observation upon the objections arising from the magnitude of the property in question, either as it now stands, or may hereafter stand, or as to the motives which may have influenced this testator, nor his neglect of those considerations by which I or any other individual may or ought to have been moved; that would be to suppose that such topics can in any way affect the judicial mind. For these imperfect reasons, I concur with the rest of the judges in offering this answer to your lordships' first question.

With respect to your lordships' second question, the objection to such child being entitled must arise from an allowance having been made for the time of gestation at the end of the executory trusts. It seems to be settled that an estate may be limited in the first instance to a child unborn, and I apprehend to the first and other sons in fee as purchasers. The case of *Long* v. *Blackall,* 7 Term 100, seems, to have decided that an infant *in ventre matris* is a life in being. The established length of time during which the vesting may be suspended is during a life or lives in being, the period of gestation, and the infancy of such posthumous child. If then this time has been allowed in some cases at the beginning, and in others at the termination of the suspension, and if such children are considered by the construction of the Stat. of 10 & 11 W. 3, c. 16, as being born to such purposes, what should prevent the period of gestation being allowed both at the commencement and termination of the suspension, if it should be called for? In those cases where it has been allowed at the commencement, and particularly in *Long* v. *Blackall,* [*394] it must have been obvious to the court that it might be wanting at the termination, yet that was never made an objection. In *Gulliver* v. *Wickett,* the child which was supposed to be *in ventre sa mere* might have married and died before 21, and have left his wife *enceinte;* in that case a double allowance would have been required, yet that possibility was never made an objection, although it was obvious. In *Long* v. *Blackall,* according to the printed report, the precise point was not gone into. But it is plain that the attention of the court must have been drawn to it for the learned judge who argued that case in support of the devise, expressly stated "that every common case of a limitation over, after a devise for a life in being, with remainder in trust to his unborn issue, includes the same contingency as was then in question; for the heir for life may die leaving his wife *enceinte,* and the only difference is that the period of gestation occurs at the beginning instead of the end of the first legal estate. It must have been palpable that it might possibly occur at both ends. Every reason then for allowing the period of gestation in the one case seems to apply with equal force to the other, and leads the mind to this conclusion, that it ought to be allowed in

both cases, or in either case but natural justice in several cases having considered children *in ventre sa mere* as living at the death of the father, it should seem that no distinction can properly be made, but that in the singular event of both periods being required, they should be allowed, as there can be no tendency to a perpetuity.

Judgment affirmed.

Statute of New York, Michigan, &c.

"Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed by this article. Such power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed." **N. Y.** R. S. (1828), pt. 2, c. 1, t. 2, Art. 1, §14; **Mich.** R. S. (1846), c. 62, §14, C. L. (1897), §8796; **Minn.** St. (1866), c. 45, §14, R. L. (1905), §3203; **Wis.** R. S. (1849), c. 56, §14, St. (1898), §2038.

"The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate, except in the single case mentioned in the next section." **N. Y.** R. S. (1828), pt. 2, c. 1, t. 2, Art. 1, §15; **Mich.** R. S. (1846), c. 62, §15, C. L. (1897), §8797; **Minn.** St. (1866), c. 45, §15, R. L. (1905), §3204; **Wis.** R. S. (1849), c. 56, §15, St. (1898), §2039.

"A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the person to whom the first remainder is limited, shall die under the age of 21 years, or upon any other contingency, by which the estate of such persons may be determined before they attain their full age." **N. Y.** R. S. (1828), pt. 2, c. 1, t. 2, Art. 1, §16; **Mich.** R. S. (1846), c. 62, §16, C. L. (1897), §8798; **Minn.** St. (1866), c. 45, §16, R. L. (1905), §3205; **Wis.** R. S. (1849), c. 56, §16, St. (1898), §2040.

"Successive estates for life shall not be limited, unless to persons in being at the creation thereof; and where a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of two persons first entitled thereto, shall be void, and upon the death of these persons, the remainder shall take effect in the same manner as if no other life estates han been created." **N. Y.** R. S. (1828), pt. 2, c. 1, t. 2, Art. 1, §17; **Mich.** R. S. (1846), c. 62, §17, C. L. (1897), §8799; **Minn.** St. (1866), c. 45, §17, R. L. (1905), §3206; **Wis.** R. S. (1849), c. 56, §17, St. (1898), §2041.

"No remainder shall be created upon an estate for the life of any other person or persons than the grantee or devisee of such estate; unless such remainder be in fee; nor shall a remainder be created upon such an estate in a term of years, unless it be for the whole residue of such term." **N. Y.** R. S. (1828), pt. 2, c. 1, t. 2, Art. 1, § 18; **Mich.** R. S. (1846), c. 62, § 18, C. L. (1897), §8800; **Minn.** St. (1866), c. 45, §18, R. L. (1905), §3207; **Wis.** R. S. (1849), c. 56, §18, St. (1898), §2042.

"When a remainder shall be created upon any such life estates, and more than two persons shall be named as the persons during whose lives the life estate shall continue, the remainder shall take effect upon the death of the two persons first named, in the same manner as if no other lives had been introduced." **N. Y.** R. S. (1828), pt. 2, c. 1, t. 2, Art. 1, § 19; **Mich.** R. S. (1846), c. 62, § 19, C. L. (1897), § 8801; **Minn.** St. (1866), c. 45, §19, R. L. (1905), §3208; **Wis.** R. S. (1849), c. 56, §19, St. (1898), §2043.

"A contingent remainder shall not be created on a term of years, unless the nature of the contingency on which it is limited be such that the re-

mainder must vest in interest, during the continuance of not more than two lives in being at the creation of such remainder, or upon the termination thereof." N. Y. R. S. (1828), pt. 2, c. 1, t. 2, Art. 1, §20; Mich. R. S. (1846), c. 62, §20, C. L. (1897), §8802; Minn. St. (1866), c. 45, §20, R. L. (1905), §3209; Wis. R. S. (1849), c. 56, §20, St. (1898), §2044.

"No estate for life shall be limited as a remainder on a term of years, except to a person in being, at the creation of such estate." N. Y. R. S. (1828), pt. 2, c. 1, t. 2, Art. 1, § 21; Mich. R. S. (1846), c. 62, § 21, C. L. (1897), §8803; Minn. St. (1866), c. 45, §21, R. L. (1905), §3210; Wis. R. S. (1849), c. 56, §21, St. (1898), §2045.

LAWRENCE'S APPEAL, in Pa. Sup. Ct., Oct. 6, 1890—136 Pa. St. 354, 20 Atl. 521, 20 Am. St. Rep. 925, 11 L. R. A. 85.

CLARK, J.—John Lawrence died domiciled in the city of Philadelphia, in the month of March, 1847. By his last will and testament he devised all his real and personal estate to certain persons therein named in trust, to pay over the net income, during her life-time, to his daughter, Ann Appleton; to assign the real estate upon her decease in fee to the appointees of her last will; or, failing such appointment, to pay over the same to and among her then living children, and the issue of children then deceased. The trustees named in the will were removed by the orphans' court of Philadelphia county, during the life-time of Ann Appleton, and George W. Appleton and Henry Pomerene were duly appointed trustees in their place. All the property, except certain real estate in Philadelphia, was lost by the *devastavit* of the original trustees; the remaining property being known as "No. 43 South Second Street," "No. 221 Arch Street," and "Nos. 1127 and 1129 Pine Street." Ann Appleton, the donee of the power, died in March, 1883, domiciled in the state of New Jersey, leaving to survive her certain children, all of whom, it is conceded, were born during the life-time of John Lawrence. By her last will and testament in writing, which was afterwards duly probated she devised to George W. Appleton, and, in the event of his renunciation or decease, to the Philadelphia Trust, etc., Company, certain property of her own, in Haddonfield, N. J., and also all that remained of the property over which she held the power of appointment, under the will of John Lawrence, specifically referring thereto, in trust to care for the same, and collect the income thereof, during the joint lives of her children, all of whom, as we have said, were living at the death of John Lawrence; to pay out of such income and the proceeds of sale of the Haddonfield property, if sold under the authority given, certain annuities mentioned, during that period; and, after the expiration of said joint lives, to transfer the *corpus* of the property to the New York Baptist Union, for ministerial education, which is the corporate name of what is known as the "Rochester Theological Seminary." George W. Appleton died December 1, 1886, and, the Philadelphia Trust, etc., Company having renounced the trust, the office of trustee under the appointment in the will of Ann Appleton became vacant; whereupon Ann Eliza Griffin, one of the annuitants for life, presented her petition for the appointment of a successor to the trust created by the donee of the power. The ap-

pellants resisted this application, alleging that the execution of the power by Ann Appleton was invalid, and that Mrs. Griffin had, therefore, no standing in court to ask for the appointment of a trustee, the estate having passed to those entitled in remainder, under the will of John Lawrence, deceased, as if Ann Appleton had died intestate. Their contention is—*First,* that the appointment violates the rule against perpetuities, and is therefore wholly void; and, *second,* that, while the donee of the power by its terms could make a direct, immediate, and absolute appointment of the fee, she was not authorized to declare uses and trusts as contained in her will.

The rule, as stated in *Gray on Perpetuities,* is as follows: "No interest, subject to a condition precedent, is good unless the condition must be fulfilled, if at all, within twenty-one years after some life in being, at the creation of the interest." This rule is in force in all of the states where the principles of the common law prevail, excepting as it may have been modified by statute. In Pennsylvania it is unaffected by statute, only as it is modified by the acts of 18th April, 1853, § 9, and 26th April, 1855, § 12, which were suggested by the Thellusen Act, and operate only in restraint of accumulations. It seems to be conceded, and rightly too, we think, that, although Ann Appleton was domiciled at her death in New Jersey, the validity of the appointment, if there should be any conflict, is to be determined by the laws of Pennsylvania, which is the *lex rei sitae.* Any inquiry as to the law of New Jersey is therefore rendered unnecessary. The rule, as stated, applies to interests in realty or in personalty, whether legal or equitable, but has no application to an interest which is vested, for a vested interest by its very nature cannot be subject to a condition precedent. So, also, where a power of appointment is given, either by deed or will, the rule applies as well to the power as to the appointment. If a power can be exercised at a time beyond the limits of the rule it is bad. As, in the case at bar, however, the power must be exercised, if at all, in the life-time of Ann Appleton, a life in being at the time of its creation, it cannot be impeached upon that ground; and, although the power to be exercised by will only is in the most general terms, it is not rendered bad by the fact that, within its terms, an appointment might possibly have been made which would be too remote. *Gray, Perp.* § 510. The direct and specific object of the power, according to its terms, is not to create a perpetuity; and, as the exercise of it is necessarily according to a certain discretion or latitude of choice in the donee, the security which the law provides against the violation of the law of remoteness is in the failure of any disposition which results from the abuse of that discretion. *Lewis, Perp.* 487. The question, therefore, is upon the validity of the appointment which was in fact made. As a general rule, whether an appointment made in execution of a power is too remote depends upon its distance from the creation of the power, and not from its execution. *Gray, Perp.* § 514; *Lewis, Perp.* 484. The exception is when the power is general to the donee to appoint, to whomsoever he may choose, either by deed or will. In such case the donee has absolute control as if he had the

fee, since he can appoint as well to himself as to any other person. He is practically the owner. In such case the degree of remoteness is measured from the time of the exercise of the power, and not from the time of its creation. *Bray* v. *Bree,* 2 Clark & F. 453; Sugd. Powers, 394, 683; *Lewis, Perp.* 483; *Gray, Perp.* §§ 477-524; *Mifflin's Appeal,* 121 Pa. St. 205, 15 Atl. 525. But it will be seen that the power given to Ann Appleton is a power to be exercised by will only. Her authority is not commensurate with the entire ownership. She could not appoint to herself, nor to any other person, to take in her life-time. She had not the absolute control, and, although the decisions are somewhat conflicting, and the question not free from doubt, the better opinion seems to be that the power must be regarded as special; and therefore the remoteness of the estate created by the appointment must be measured from the time of the creation of the power, which was at the death of John Lawrence. See *In re Powell's Trusts,* 39 Law J. Ch. 188; *Gray, Perp.* § 526; and cases there cited. No estate or interest can be limited under a particular power, which would have been too remote if limited in the deed or will creating the power. *Lewis, Perp.* 488. But, assuming that the remoteness of the appointment depends upon its distance from the creation of the power, it is plain that the several bequests and annuities made in the last will and testament of Ann Appleton, deceased, were to persons named and in being, for distinct and separable sums of money, by way of bequest or annuity, out of the proceeds of her own and the income of the original trust estate.

The manifest purpose of the trust was to preserve the estate for the legatees and annuitants for the life of her children and the survivor of them. At the death of the last child her surviving, their object would be fully attained; the annuities, whether to children, grandchildren, or to others, were then to terminate, and the entire trust-estate then remaining was to be conveyed to the New York Baptist Union, etc., in fee, to be applied as by the will is directed. We have then a devise to the trustees, in trust for the annuitants, for the life of the children of the donee, and the survivor of them, with a remainder over in fee to the Baptist Union. Ann Appleton, as the donee of the power, had the right by her will to appoint to whom she chose. She certainly had a right to appoint to her children for life, or to trustees for their use for life, whether they were born before or after the decease of John Lawrence; and that, although the estate in remainder might be too remote, the annuitants would take at her decease. "Where, under a power, interests are given by way of particular estate and remainder, (including analogous gifts of personal estate,) and the particular estate is limited to a valid object of the power, but the remainder is too remote, the appointment will not be wholly void, but only the gift in remainder. In such case, the interests, in respect of which there is an excess of the power, being distinct and separable from the valid portion of the appointment, there is no reason for involving the primary limitation in the remoteness of the remainder." *Lewis, Perp.* 496; citing *Adams* v. *Adams,* Cowp. 651; *Bristow* v. *Warde,* 2 Ves. Jr. 336; *Routledge* v. *Dorril,* Id. 357;

Brudenell v. *Elwes,* 1 East, 442, 7 Ves. 382; *Butcher* v. *Butcher,* 9 Ves. 382; *Gray, Perp.* §§ 232, 239, 242, citing *Read* v. *Gooding,* 21 Beav. 478, 4 De Gex, M. & G. 510, and other cases. See, also, *Davenport* v. *Harris,* 3 Grant Cas. 168. In this respect we think the ruling in *Smith's Appeal,* 88 Pa. St. 492, was wrong; for, although Ryan's daughter, Mrs. Smith, might have had children born after his decease, her children, whether born before or after Ryan's death, would have taken at her death, and the life-estates were therefore good; whereas, it was held that her appointment was wholly bad.

This statement of the law would seem to be decisive of the case at bar, for the proceeding is not by the party entitled in remainder for a conveyance, but by one of the annuitants for the appointment of a trustee, for the purposes of the trust subsisting under the will of Ann Appleton, for the benefit of the annuitants, during the life of her children. But the estate of the Baptist Union also vested at the death of Ann Appleton. The beneficiaries under her will are described by name; to each is given a separate and distinct sum by way of legacy or annuity; to each one *eo nomine;* and, as we have said, their rights vested at their mother's death. The remainder was ready, at any time after the death of Ann Appleton, to come into the possession of the Baptist Union whenever and however the life-estate might determine. It was subject to no condition precedent, save the determination of the preceding estate. The contingency was not annexed to the gift, or to the person entitled, but to the time of enjoyment merely; and, according to all the cases, the remainder must be treated, not as a contingent, but as a vested, estate. If this be so the rule against remoteness is satisfied, for not only the particular estate, but the remainder supported by it, took effect within lives in being at the creation of the power. "The particular feature," says Mr. *Lewis,* in his treatise on *Perpetuities,* "in limitations of future interests, with which the rule against perpetuities is connected, is the time of their vesting, or, in other words, of their becoming transmissible to the representative of the grantee, devisee, or legatee, and disposable by him. When they are so limited as necessarily to allow this quality, within the legal period of remoteness, they are free from objection in reference to the perpetuity rule." Upon this question we may also refer to *Mifflin's Appeal,* 121 Pa. St. 205, 15 Atl. 525. "If a remainder is vested, that is, if it is ready to take effect whenever and however the particular estate determines, it is immaterial that the particular estate is determinable by a contingency which may fall beyond a life or lives in being." *Gray, Perp.* § 209. Perpetuities are grants of property wherein the vesting of an estate is unlawfully postponed. *Philadelphia* v. *Girard's Heirs,* 45 Pa. St. 26; *Barclay* v. *Lewis,* 67 Pa. St. 316. The main question decided in Smith's Appeal is therefore not involved in this case. The accuracy of that decision has been somewhat doubted by the learned judge who wrote it, (*Coggins' Appeal,* 124 Pa. St. 10, 16 Atl. 579,) but the subject can only be further considered when a proper case is presented.

Nor do we think the appointment is invalid, because in the exercise

of the power the donee, without special direction of John Lawrence, the testator, to that effect, in appointing the fee, declared certain uses and trusts for life, with remainder over. The power conferred upon Mrs. Appleton by her father's will was "to grant and convey the real estate in fee," "in such parts or shares" as she by her last will should direct. The power is wholly unrestricted. The entire discretion is committed to the donee of the power to grant the fee in such form and to such persons as she chose. In the exercise of that power she did appoint the fee, and we think she was authorized, observing the rule against remoteness, to declare such uses and trusts for life as would best carry out her wishes with respect to the ultimate disposal of the property. No authorities have been cited to any different effect. On the contrary, appointments in trust, even under restricted powers, would seem to have been sustained, and, as illustrations of this, we have been referred to *Alexander* v. *Alexander,* 2 Ves. Sr. 642; *Trollope* v. *Linton,* 1 Sim. & S. 477; *Crompe* v. *Barrow,* 4 Ves. 681; *Willis* v. *Kymer,* 7 Ch. Div. 181; 2 *Sugd. Powers,* 273, 274. The decree of the orphans' court is affirmed, and the appeal dismissed at the cost of the appellants.